

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:** \*

**WILDWOOD MEDICAL CENTER, LLC** \*

Petitioner \*

Sassan Gharai, \*

Victoria Bryant \*

C. Craig Hedberg \*

Pearce C. Wroe \*

For the Petition \*

Jody S. Kline, Esq. & Soo Lee-Cho, Esq. \*

Attorneys for Petitioner \*

\*\*\*\*\* \*

Ann Bryan, individually and on behalf of \*

Wildwood Manor Citizen's Assoc. (WMCA) \*

Norman Knopf, Esquire \*

Attorney for WMCA \*

Nick Attretti & Adrienne Batten \*

Community Participants Not Opposed \*

\*\*\*\*\* \*

Joseph Dias \*

Melitta Carter \*

Patricia Broderick \*

Wendy Calhoun \*

Andrea Gabossy \*

Brenda Sandler \*

Community Participants in Opposition \*

\*\*\*\*\* \*

Board of Appeals Case No. S-2830  
OZAH Case No. 12-28

Report and Recommendation by: Martin L. Grossman, Hearing Examiner  
Hearing conducted by: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## **I. STATEMENT OF THE CASE**

Petition No. S-2830, filed on February 22, 2012, by Wildwood Medical Center, LLC, seeks a special exception pursuant to §59-G-2.36.2 of the Zoning Ordinance, to build and operate a five-story, 58-unit, residential apartment building on Lot N-541, Wildwood Manor Shopping Center Subdivision, located at 10401 Old Georgetown Road, Bethesda, Maryland 20814, in the O-M Zone. Petitioner is the owner of the property (Tax Account Number 07-03669303).

The subject site consists of approximately 3.47 acres (151,220 square feet) on the eastern side of Old Georgetown Road (MD Route 187), just north of its intersection with Democracy Boulevard. A bank building and a three-story medical office building already exist on the site, and this proposal would add an apartment building to the southern end of the property. The medical office building was constructed in the 1960s pursuant to Special Exception CBA-1667, and the bank building was added following approval of the rezoning described below.

Petitioner had originally intended to also add a three-story general office building to the site. To that end, it had filed an application for a Local Map Amendment (LMA G-851), which was approved by County Council in Resolution 16-392 on November 27, 2007. Attachment 11 to the Technical Staff report (Exhibit 20). The Resolution reclassified the property from the R-90 Zone to the O-M Zone and approved a Schematic Development Plan (an SDP), which included the bank building and the then-proposed three-story, general office building on the southern end of the site.

Finding that recent market conditions did not warrant the addition of the previously planned general office building (Exhibit 4(a)), Petitioner now seeks permission to substitute a five-story residential building, which will provide “productivity housing,” at the location originally planned for the general office building. To do so requires the granting of a special exception by the Board of Appeals (*i.e.*, this petition), as well as the approval of a Schematic Development Plan Amendment (an SDPA) from the County Council to modify the SDP approved by the Council in G-851. Thus, Petitioner has

also filed Application SDPA 12-1 seeking Council approval. A copy of the original SDP in G-851 is labeled Exhibit 8 in the file of SDPA 12-1. As of this writing, the proposed final version of the SDPA is labeled Exhibit 47(a) in the file of SDPA 12-1.

By letter dated March 14, 2012, Petitioner's attorneys requested that a single hearing be scheduled to take evidence on both S-2830 and SDPA 12-1. Exhibit 13. On March 20, 2012, Norman Knopf, Esquire entered his appearance on behalf of the Wildwood Manor Citizen's Association (WMCA), and requested that the combined cases be heard on July 27, 2012. Exhibit 15. Thus, on March 20, 2012, the Board of Appeals issued a notice scheduling the hearing for July 27, 2012, at 9:30 a.m. before the Office of Zoning and Administrative Hearings. Exhibit 12(b). The petition was amended a number of times by Petitioner in an effort to address concerns raised by Technical Staff and WMCA (Exhibits 16, 18, 23 and 26), and notices of the amendments were issued as required (Exhibits 17, 19 and 24). Based on these amendments, which include commitments to binding elements in the proposed SDPA 12-1 and conditions for the proposed special exception, WMCA indicated that it would not oppose the special exception or the SDPA. Exhibits 22 and 31. However, strong opposition was voiced by individual residents of the neighborhood. Exhibits 21, 27 and 30.<sup>1</sup> The opposition raises concerns about adequacy of parking, traffic congestion, pedestrian safety, school impacts, stormwater management, environmental issues and the placement of the posted notices.

Technical Staff, in a memorandum dated June 29, 2012, recommended approval of the special exception petition (and the SDPA), subject to specified conditions (Exhibit 20, pp. 16-17).<sup>2</sup> On July 12, 2011, the Planning Board voted unanimously to recommend approval of the special exception, with modified conditions, as specified in the transmittal letter, dated July 18, 2012 (Exhibits 25 and 45). The

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<sup>1</sup> Numerous e-mails from neighbors in opposition to SDPA 12-1 were also sent directly to Council members and forwarded to this office to be placed in the record (SDPA Exhibits 25(a)-(k) and 26).

<sup>2</sup> The Technical Staff Report is frequently quoted and paraphrased herein.

Planning Board also voted unanimously to recommend approval of SDPA 12-1 at its July 12 meeting, as noted in its July 18, 2012 letter to the Council (Special Exception Exhibit 45(a) and SDPA Exhibit 34).

A combined public hearing for both cases was presided over by Hearing Examiner Lynn Robeson, as scheduled, on July 27, 2012.<sup>3</sup> Four witnesses were called by Petitioner. The Wildwood Manor Citizen's Association (WMCA) appeared through counsel, Norman Knopf, Esquire, and through an authorized representative, Ann Bryan, who offered testimony on behalf of WMCA. With modifications agreed to by the Petitioner, WMCA does not oppose the applications.

However, six individual neighbors testified in opposition to the applications – Joseph Dias, Melitta Carter, Patricia Broderick, Wendy Calhoun, Andrea Gabossy and Brenda Sandler.<sup>4</sup> At the end of the hearing, the record was held open for 30 days, until August 27, 2012, for additional filings and comments by interested parties. Tr. 297-298.

A new Hearing Examiner, Martin L. Grossman, was assigned to review the entire record in the Wildwood cases and write reports and recommendations to the Board of Appeals and the Council, in accordance with similar procedures prescribed in Zoning Ordinance §59-H-5.13 and Board of Appeals Rule 8.0. Based on that review, Hearing Examiner Grossman entered orders in both cases on August 21, 2012. The Order in the Special Exception case (Exhibit 50), *inter alia*, suggested the possibility of an additional condition regarding traffic safety and extended the record-open date to August 31, 2012, to allow 10 days for comments.<sup>5</sup>

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<sup>3</sup> Because of notice issues peculiar to the SDPA case, the Hearing Examiner found it necessary to schedule an additional hearing date for SDPA 12-1. See Order of August 31, 2012 in the SDPA case (Exhibit 50 in the SDPA file). The notice letters mailed out to the adjacent and confronting neighbors in S-2830 failed to mention that the hearing would also address the SDPA case. The follow-up hearing in SDPA 12-1, scheduled for October 19, 2012, will ensure that the neighbors have had sufficient notice of their opportunity to cross-examine Applicant's witnesses regarding the proposed SDPA, not just the special exception application.

<sup>4</sup> Two individuals, Nick Attretti and Adrienne Batten, participated in the hearing by cross-examining one of Applicant's witnesses because they are tenants of the adjacent medical office building and they had concerns about the adequacy of parking. They did not testify, nor express opposition to the project. Tr. 74-79 and 86-89.

<sup>5</sup> Because the proposed SDPA contains binding elements that require consistency with any special exception approved by the Board of Appeals in this case, action by the Board of Appeals on the special exception petition is a prerequisite to consideration by the Council of the SDPA application. Therefore, the Hearing Examiner's August 21, 2012 Order in the

Additional comments were filed while the record was open by neighbor Patricia Broderick, concerning the placement of the posted notices (Exhibit 47); by neighbors James and Kimberly Balow, concerning traffic, parking and stormwater management (Exhibit 49); by neighbor Melitta Carter, further commenting on traffic and pedestrian safety issues (Exhibit 51); by neighbor Joseph Dias, emphasizing his testimony regarding stormwater management (Exhibit 52); by Beverly Heller, Vice-President of the Wildwood Estates Homeowners Association, an adjacent property owner, inviting commentary from Federal Realty Investment Trust, the owner of the Wildwood Shopping Center (Exhibit 53); by Diane Cameron, Conservation Director of the Audubon Naturalist Society, supporting Mr. Dias's testimony (Exhibit 55); by opponent Patricia Broderick, further commenting on the placement of notice signs (Exhibit 58); and by Petitioner's attorney, Jody Kline, responding to the possibility of a condition regarding stop signs at the southern access points (Exhibit 59).

Petitioner also filed a revised Special Exception Site Plan (Exhibit 56(a)), on August 30, 2012, correcting a typographical error in the Site Data Table of the earlier filed plan.<sup>6</sup> All of the post-hearing submissions filed while the record was open were received into evidence without objection. The record in S-2830 closed, as scheduled, on August 31, 2012, but had to be reopened until September 28, 2012, to allow Petitioner additional time to file required electronic copies of exhibits (Exhibit 60). The re-opened record closed as scheduled on September 28, 2012.

The concerns raised by the opposition witnesses are discussed in Parts II. C. E. and F. of this report. As will appear more fully below, in spite of their concerns, the record amply supports the granting of this petition, with the conditions recommended by the Planning Board and the Hearing Examiner.

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SDPA case (Exhibit 40 in SDPA 12-1 file), directed, *inter alia*, that the record in SDPA 12-1 will remain open until 10 days after the effective date of the Board's resolution in this special exception case.

<sup>6</sup> The earlier versions of the Special Exception Site Plan (e.g., Exhibit 26(a)) incorrectly listed the setback of the proposed building from Berkshire Drive as 63 feet in the Site Data Table, while the site layout on the Special Exception Site Plan (in both versions) shows that the setback will actually be 62 feet. Since the correct figure of 62 feet was discussed at the public hearing (Tr. 36) and was correctly listed in the site layout on the plan provided in advance of the hearing (Exhibit 26(a)), the Hearing Examiner sees no reason to further delay the closing of the special exception record for additional comment.

In addition, Petitioner filed a revised SDPA clarifying some of the language in the binding elements (Exhibit 47(a) in the SDPA file). Those changes may be commented upon by interested parties at the follow-up SDPA hearing.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The subject property consists of 3.5-acres of land in the O-M Zone. It is recorded as Lot N541, Parcel C of the Wildwood Manor Shopping Center subdivision. The site, which is immediately north of the shopping center, is described by Technical Staff as follows (Exhibit 20, p. 2):

... The property is located in the southeast quadrant of the intersection of Old Georgetown Road (MD 187) and Rock Spring Drive. The property is developed with a three-story 36,423-square foot medical office building, a 3,460-square foot bank and associated surface parking. There are approximately 206 surface parking spaces on-site. The property has approximately 340 feet of frontage on Old Georgetown Road. The site's parking area interconnects with a gas station abutting the southwest corner of the site and, at three locations along its southern boundary, with the Wildwood Shopping Center. Both the gas station and shopping center have direct access to Old Georgetown Road. The subject property abuts Berkshire Drive to the west, but has no vehicular connection to it.

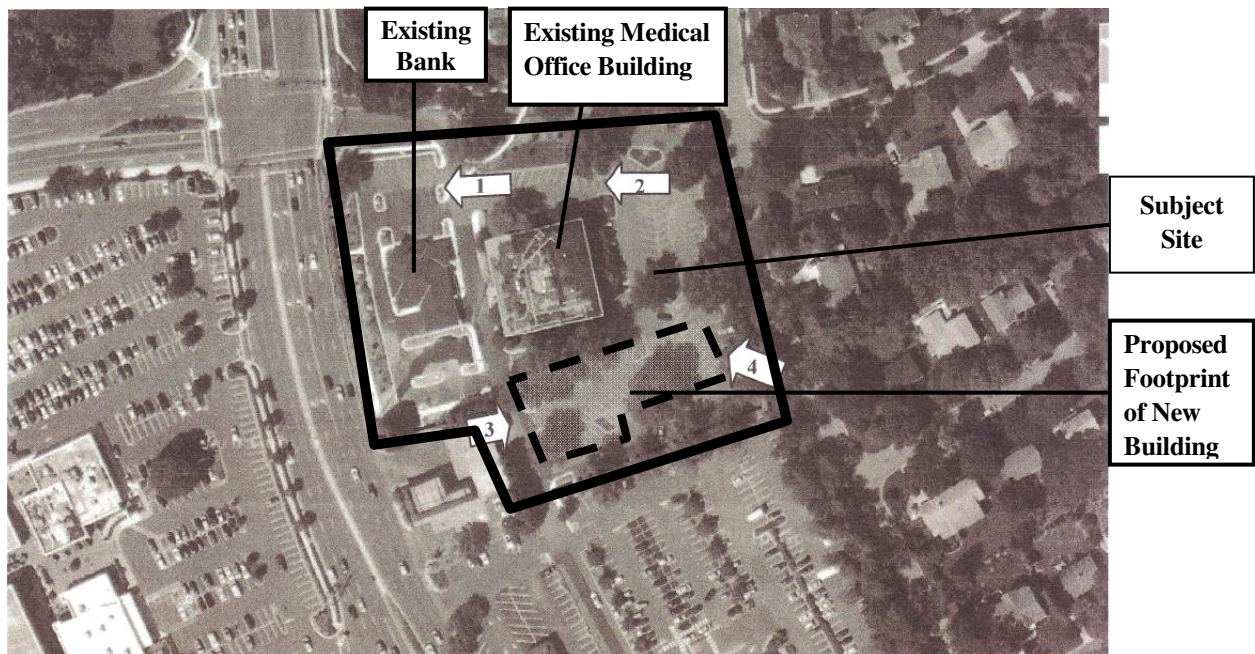
The property slopes moderately down from the northwest corner to the southeast corner. It is landscaped with trees and shrubs near the existing office building and bank within the parking area and along Old Georgetown Road. The site contains no sensitive environmental features.

The site is depicted below in an aerial photo from the Staff report (Exhibit 20, p. 3):





Another helpful view of the subject site was submitted by Petitioner as part of its justification for applying shared parking calculations to the site (Exhibit 18(d) attachments):



The proposed location of the new building is between the arrows labeled “3” and “4,” above. Ground level photos taken from the numbered locations are reproduced below:





The special exception applicant, Wildwood Medical Center, LLC, is also the owner of the property, according to Maryland property tax records, of which the Hearing Examiner takes official notice. The property is about 1200 feet south of the I-270 Interchange with Old Georgetown Road (MD 187). Exhibit 20, Attachment 11.

Vehicular access to the site is available from the north via a stub road, which in effect extends Rock Spring Drive eastward, a short way across Old Georgetown Road onto an ingress/egress easement. (The extension does not continue all the way to Berkshire Drive on the east). The site may be accessed by vehicles from the south via driveways which exist on both the eastern and western sides of the property and connect directly to the northern parking lot of the Wildwood Shopping Center. That parking lot mostly serves customers of Balducci's market, the northernmost retailer in the Wildwood Shopping Center.

The subject site was further described by Victoria Bryant, Petitioner's land planner. There is a significant number of trees along the northern boundary between the site and the single-family homes to the north, and there is a hedge row between the site and Berkshire Drive to the east. Ms. Bryant indicated that there is about a 10-foot difference in elevation between the site of the proposed building and Berkshire Drive. There are trees (a row of hemlocks), which create "a fairly decent evergreen screen" and an existing 6 foot wooden fence separating that street and the site. Although there is no vehicular connection between Berkshire Drive and the property, there are pedestrian connections through openings in the fence. There is also a fairly extensive sidewalk system allowing pedestrian movement through the site. A ten-foot planting island delineates the site from Balducci's parking lot. Tr. 96-101.

The property does not have any existing forest, nor is it in a stream valley buffer or a special protection area. Exhibit 20, p. 24. However, there are issues regarding stormwater management which will be discussed in Part II. E. of this report.

The zoning and land use history of the subject site was well described in the Technical Staff report (Exhibit 20, p. 4):

The subject property was classified under the R-90 zone in the 1954 comprehensive zoning of the area. In 1964, the Board of Appeals approved special exception number BA-1631, allowing construction of a medical office building on the property. The R-90 zoning was reaffirmed by Sectional Map Amendment in 1992 (G-706). The subject property was rezoned from the R-90 zone to the O-M zone by Local Map Amendment G-851 on November 27, 2007, which was submitted under the Optional Method of development requiring an SDP and establishing binding elements with respect to land use, development standards, and staging. The Opinion issued by the County Council is appended to [the] staff report [as Attachment 11]. In 2009, the Planning Board approved a Preliminary Plan 11989271A and Site Plan 820080240. . . .

### **B. The Neighborhood and its Character**

Staff defined the neighborhood as generally bounded by I-270 to the north, Farnham Drive to the east, Old Georgetown Road to the west, and Cheshire Drive to the south, as depicted in the following map by a solid yellow line (Exhibit 20, pp. 3-4):



Petitioner's land planner, Victoria Bryant, accepted this definition (Tr. 93-94); however, the evidence presented by Mr. Joseph Dias (Tr. 175-211 and Exhibits 27 and 52(a)) and Petitioner's civil engineer, Pearce Wroe (Tr. 287-288), convinces the Hearing Examiner that the neighborhood boundaries should be extended to include the area where there is an outfall of stormwater runoff, a portion of which is generated by the subject site.

The stormwater issue will be discussed at length later in this report. Suffice it to say at this point, it is undisputed that the area immediately around Mr. Dias's home is severely affected by stormwater runoff, some of which comes from the subject site. Although the definition of the special exception "neighborhood" is usually influenced by distance from the site and natural and man-made barriers (*e.g.* rivers and roads), the term is generally taken to be that area which will be most directly affected by the proposed special exception, as discussed by Ms. Bryant at the hearing. Tr. 132-134.

While it appears from the evidence that the subject site is but one of many contributors to the stormwater runoff problem, the Hearing Examiner concludes that a fair definition of the general neighborhood should include the area around Mr. Dias's home at 5917 Rudyard Drive, which is just east of Farnham Drive (Technical Staff's proposed eastern boundary). This additional area would project the defined neighborhood eastward to the intersection of Rudyard Drive and Rossmore Drive, as shown by the blue dashed line on the neighborhood map depicted on the previous page.

The Hearing Examiner hastens to add that this extension of the defined neighborhood does not necessarily mean that any additional burden falls upon the Petitioner to remedy the stormwater issue beyond what it is already committed to doing, but it does at least place Mr. Dias in the defined ballpark. Petitioner's obligations will be determined by applicable laws and regulations, as ultimately determined by the Department of Permitting Services and the Planning Board.

In addition, the Hearing Examiner would extend the neighborhood definition to include the properties confronting the subject site directly across Old Georgetown Road, as shown by a blue

dotted line on the neighborhood map depicted on page 10 of this report. This expansion would incorporate the commercial properties in the shopping center across Old Georgetown Road from the site because they will be affected by the traffic generated along Rock Spring Drive and Democracy Boulevard by the proposed special exception. According to the testimony, those roads would be major access routes for the subject site. Tr. 49-52; 259-278. Therefore, the affected properties should be included within the neighborhood definition, even though they are separated from the site by a major roadway.

Technical Staff described the neighborhood as follows (Exhibit 20, p. 3):

The surrounding area is characterized by a mixture of residential, office, and institutional uses classified in the R-90 and C-1 zones. Surrounding properties to the north and east are developed with one-family detached dwellings in the R-90 and R-90/TDR zones. Properties to the west are developed with a retail shopping center in the C-1 zone and a mix of one-family detached dwellings and townhouses in the R-60 zone. Properties to the south are developed with a retail shopping center in the C-1 zone (Wildwood Shopping Center). Although the shopping center is classified in the C-1 zone, the center's parking lot that is adjacent to the subject property operates pursuant to a special exception (CBA-1667) under the R-90 zone. A gasoline station, zoned C-1, abuts the subject property to the west. A special exception (S-1903) was approved in 1992 for an upgrade and rebuild of this site.

Petitioner's land planner added to Staff's description of the surrounding area, noting that across Old Georgetown Road to the west, there is a Giant supermarket, a Chipotle and a couple of other restaurants in the C-1 Zone, and the Walter Johnson High School is behind them. There's an MXPD site that has been partially developed with apartment buildings along Interstate 270, and there are plans for a mixed-use development for the remainder of the site. Tr. 94-95. There are single-family homes to the north and to the east, and commercial uses in the defined neighborhood. Ms. Bryant therefore found, and the Hearing Examiner agrees, that this area is a mixed-use community, rather than a single-family, residential community. Tr. 105-108.

## C. Proposed Use

### 1. Petitioner's Concept:

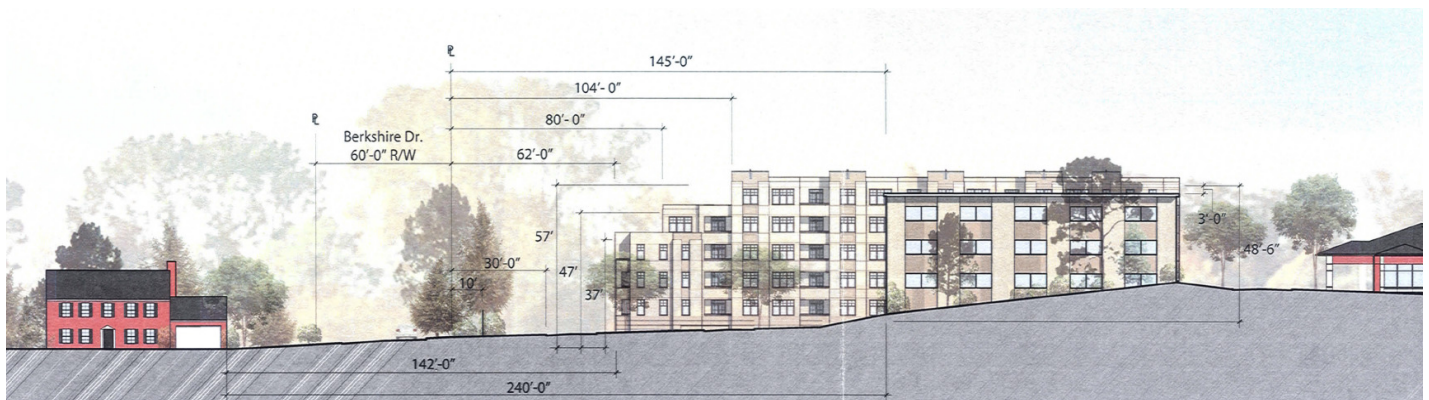
Petitioner seeks a special exception pursuant to Zoning Ordinance §59-G-2.36.2 to permit the construction of a residential dwelling in a Commercial (O-M) Zone. It would consist of a five-story, 58 unit residential apartment building, with maintenance services to be handled by employees of the Petitioner. Fifty-six of the apartments would be two-bedroom units and two would be one-bedroom units. Thirty-five percent of the units (*i.e.*, 21 units) will be made available for tenants at “productivity housing” rates for households with incomes at and below the area-wide median income, as provided for in Chapter 25B, Article IV, of the County Code, and applicable regulations. There would also be 37 market rate units, and 225 parking spaces to serve the entire site, of which 114 spaces would be located in a garage underneath the apartment building and 111 spaces would be available in the surrounding surface parking lot that serves the existing medical office building and bank.

The project was described by Technical Staff as follows (Exhibit 20, p. 5):

The proposed building will be five stories (50 feet) at its highest point, tapering down to four stories and then three stories on the eastern end of the building. The Applicant is proposing landscape screening on the east facades of the fourth and fifth floor roof tops in an effort to soften the view of the building from the Wildwood residential community. A 30-foot buffer, between the right-of-way line Berkshire Drive and the paved area for circulation on the subject property, will include existing trees and enhanced landscaping that will eliminate direct lines of site to the apartment building. The proposed building will be setback approximately 60 feet from the eastern property line.

The step downs on the eastern side are well illustrated by Petitioner's Exhibits 34, 35 and 36.

Exhibit 34, showing Site Section Dimensions, is reproduced below:





As is evident, these step downs in height along the eastern side of the proposed building will reduce its impact on the residences confronting the site across Berkshire Drive, to the east. With the setback from the property line and the vegetation along Berkshire Drive, Petitioner's architect, Sassan Gharai, believes it will be very difficult to see the building from the neighborhood to the east. Tr. 33-34. Moreover, as appears from Exhibit 35, the sight lines for an individual standing at the property line along Berkshire Drive will reveal only the lower level of the building, making the structure appear smaller and thus more compatible to the viewer (Tr. 37-40):

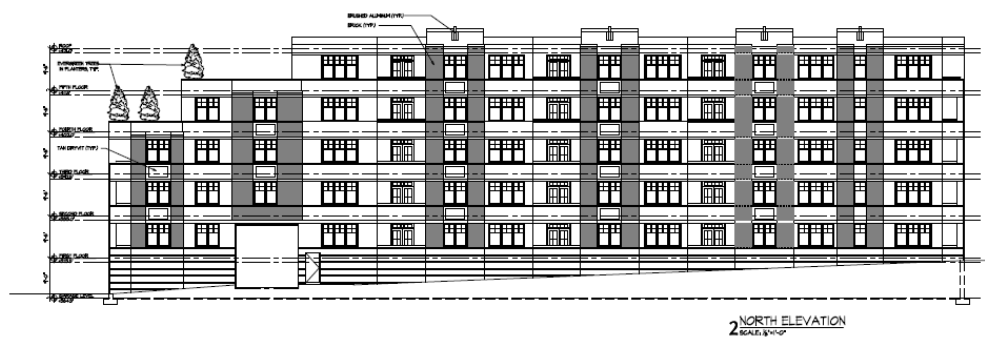
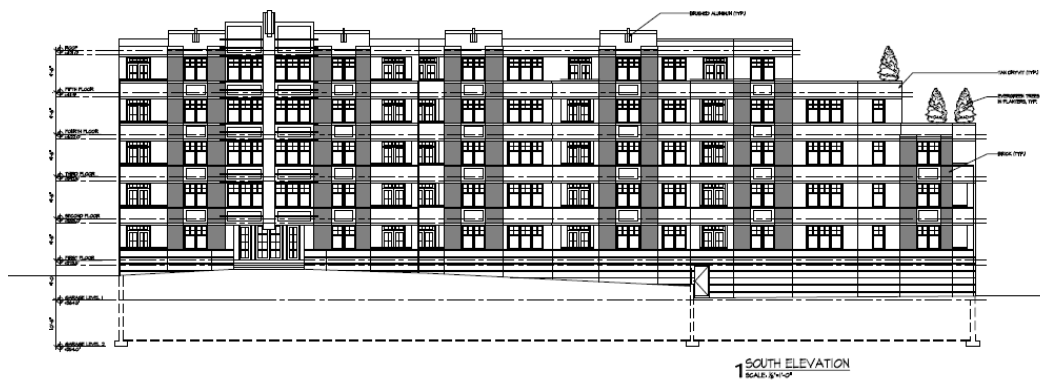


According to Mr. Gharai, trees planted on the third and fourth tiers will help to screen those levels from those in the residential neighborhood. Tr. 40-42. Crenulations (*i.e.*, irregularities in the façade) are used to reduce the apparent mass of the building. Tr. 43-44. These features are well illustrated by Exhibit 36, a rendering of the east façade of the proposed building:

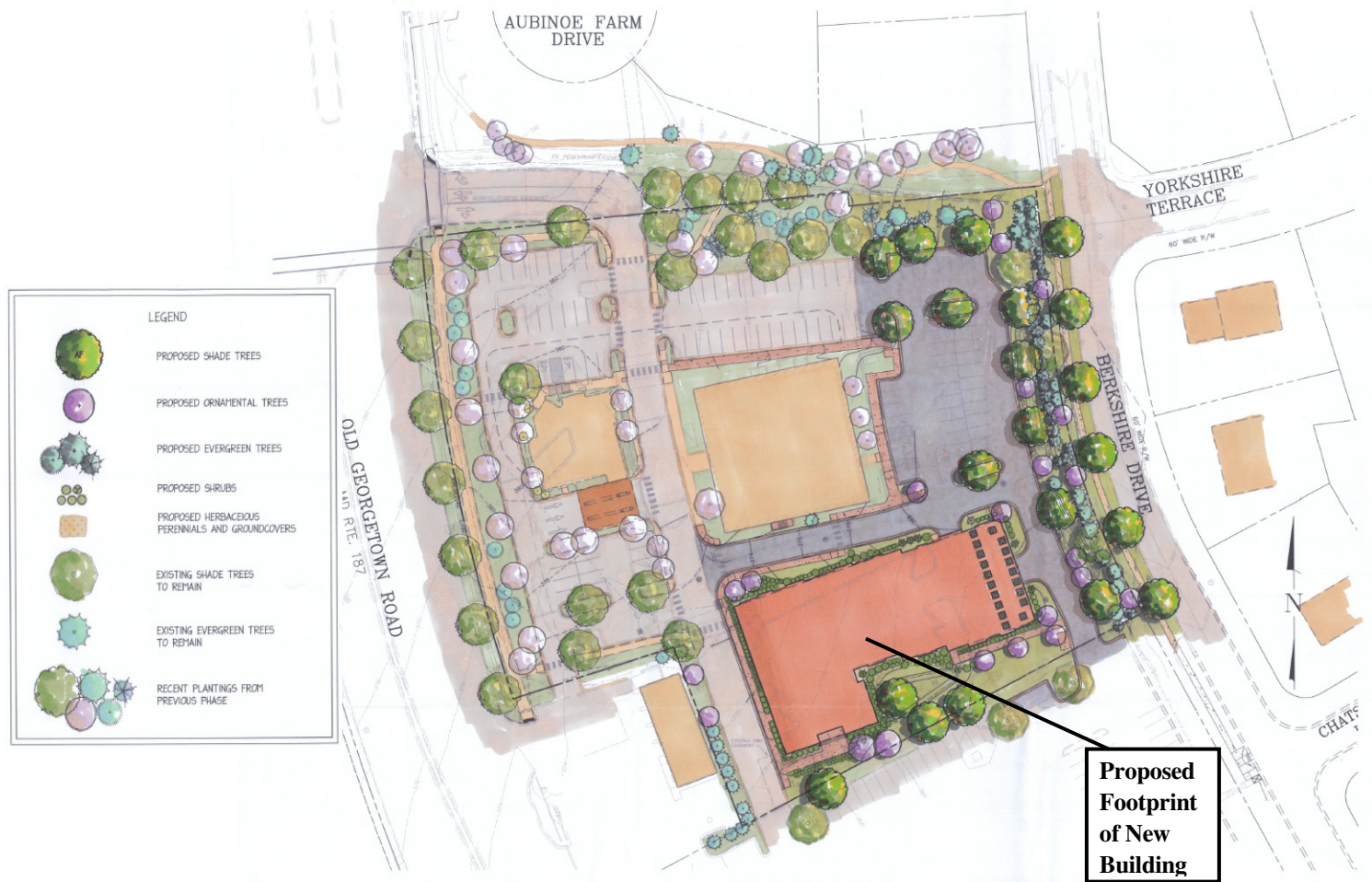


RENDERING OF EAST FACADE

The revised elevations for the proposed building (Exhibit 18(l)) are displayed below:



Using a rendered landscape plan (Exhibit 37) reproduced below, Mr. Gharai further described the proposed building:



The main entrance of the building will be in the center of the lower south bay, which faces the Wildwood Shopping Center and Balducci's parking lot. There will be a sidewalk that goes around the building and connects to the sidewalk of the existing medical office building. The garage entrance will be on the eastern side of the building, and the loading dock will be located on the north face of the building, in an area between the two commercial buildings. This is where trash will be kept and picked up during the day. In order to avoid odor and noise issues associated with this function, Mr. Gharai tucked the trash area inside the building, and the trash truck will actually pull into the building, pick trash up and remove it with minimal noise and odor. Tr. 47-48. By agreement of the parties, garbage

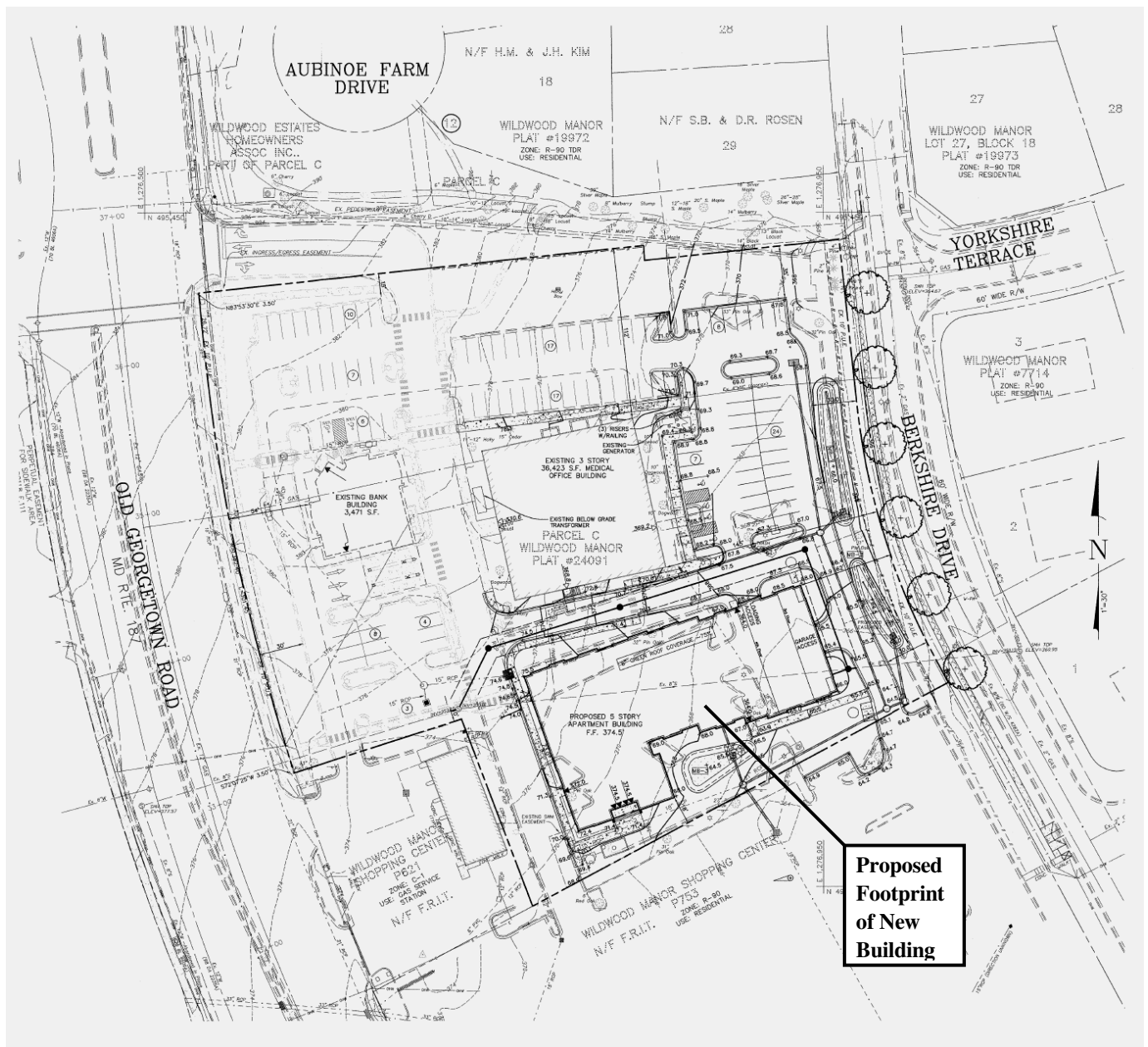
dumpster pick-ups must occur between the hours of 8:00 a.m. and 5:00 p.m. on weekdays. Tr. 66. A condition to this effect is recommended in Part V of this report.

The apartment building will have a community room, a fitness center and a business office. Residents and visitors “will be welcomed by a well-designed and well-appointed entry lobby.”

Petitioner’s Second Amended Statement of Operations (Exhibit 26(c)(i), p. 4).

## 2. The Special Exception Plan:

The revised Special Exception Plan (Exhibit 56(a)) is reproduced below:









In order to meet concerns raised by the community and to satisfy points raised by the Planning Board, Petitioner has agreed to a series of binding elements in the schematic development plan amendment to LMA G-851 (*i.e.*, SDPA 21-1) that accompanied the filing of this special exception petition. These binding elements, which *inter alia* incorporate requirements of the special exception, will establish enforceable limits if SDPA 12-1 is approved by the Council.

CATEGORY		PERMITTED/REQUIRED		BINDING ELEMENT
LAND USE		See Section 59-C-4.2 for O-M Zone		<ol style="list-style-type: none"> <li>1. <u>Uses Permitted</u> <ol style="list-style-type: none"> <li>A. Existing three story building. (Offices, general and offices, professional and business) Leasable office space must not exceed 30,000 square feet.</li> <li>B. Existing 3,471 square foot building. (Offices, general and professional (bank), <u>excluding</u> medical practitioners)</li> <li>C. Proposed five story residential apartment building containing not more than fifty-eight (58) residential dwelling units, including a minimum of 35% Productivity Housing Units (PHUs).</li> </ol> </li> </ol>
				<ol style="list-style-type: none"> <li>2. There will be no vehicular access between the Subject Property and Berkshire Drive.</li> <li>3. Roof top mechanical equipment on the proposed residential building will be located as far westward on the building as is practicable (to reduce visibility from residences to the east) and will be screened in such a manner as to reduce visibility and the appearance of height.</li> <li>4. Running the entire length of the Subject Property between the easternmost property line of the Subject Property (the right-of-way for Berkshire Drive) and the paved area for vehicular circulation</li> </ol>

			<p>on the Subject Property, there will be a green space, at least 30 feet wide, as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, and to screen the lower portions of the buildings. Within this green space the only land uses will be:</p> <ul style="list-style-type: none"> <li>(1) An approximately 6 foot high board-on-board fence;</li> <li>(2) Shade trees;</li> <li>(3) Evergreen plantings on both sides of the fence selected and located to block headlight glare.</li> </ul>
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CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
BUILDING HEIGHT	See Section 59-G-2.36.2(b)(2) (Not greater than 5 stories or 50 feet in height)	<p>5. The residential building has been designed to rise in height as it progresses from east to west. As a result, there will be a rooftop over a three-story section of the building and a rooftop over a four-story section of the building. On these rooftops, in addition to any environmental/stormwater management features that may be located on such rooftops, Applicant will install and maintain, and replace as necessary, trees in planters or appropriate tree planting containers, intended to provide extensive screening and to reduce the visibility year round of the east facing fourth floor and fifth floor facades from the homes in Wildwood Manor located east of Berkshire Drive. The details of the species of the trees, size at the time of planting, planters, location and spacing, are specified in a Landscaping Plan as part of a companion application in Special Exception Case No. S-2830 [Exhibits 26(b)(i), 26(b)(ii), and 26(b)(iii)] and the applicant will request that the implementation of this Landscape Plan be made a condition of the grant of the special exception.</p>

<p>BUILDING SETBACKS</p>	<p>See Section 59-C-4.313</p>	<p>6. The residential building shall be not greater than 5 stories or 50 feet in height as measured from the average elevation of finished ground surface along the front of the building (per Zoning Ordinance).</p> <p>7. The building design, including height of respective floors, will be substantially consistent with elevations submitted in companion Special Exception Case No. S-2830. Pedestrian circulation related to the residential building will be substantially consistent with pedestrian network features shown on the approved Special Exception Plan in companion Special Exception Case No. S-2830.</p> <p>8. Bank Building</p> <ul style="list-style-type: none"> <li>● Not closer than 50 feet to Old Georgetown Road right-of-way</li> </ul> <p>Office Building</p> <ul style="list-style-type: none"> <li>● Not less than 113 feet to abutting property line (north)</li> <li>● Not less than 145 feet to rear (Berkshire Drive) property line</li> </ul> <p>Residential Building</p> <ul style="list-style-type: none"> <li>● Not less than 16 feet to abutting property line (south)</li> <li>● Not less than 60 feet to rear (Berkshire Drive) property line</li> </ul> <p>9. FAR shall not exceed 1.3</p>
<p>FLOOR AREA RATIO</p>	<p>See Section 59-C-4.312 (1.5 FAR)</p>	

Moreover, certain “design criteria” are specified in the SDPA, to be considered at site plan review by the Planning Board. They are:

#### **DESIGN CRITERIA TO BE CONSIDERED AT SITE PLAN**

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed residential building. If any of the major assumptions on which the stormwater management plan approval is predicated change, due to unforeseen circumstances, the applicant

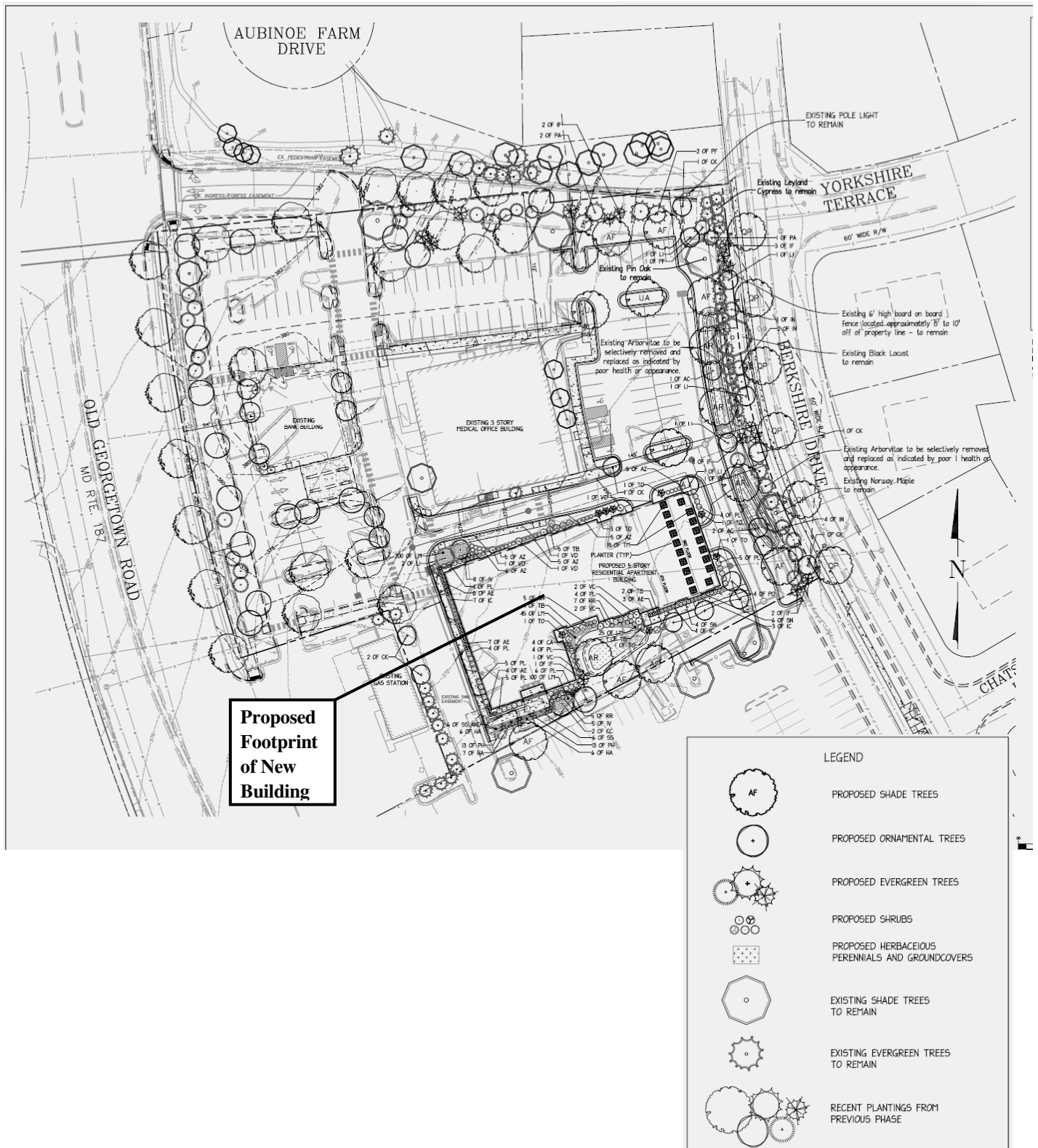
- must reapply to Montgomery County, Maryland for a new stormwater management plan approval.
2. New freestanding lighting fixtures will be the same as, or similar to existing lighting in terms of style, height, and wattage. Any lighting fixtures affixed to or associated with the residential building on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.
  3. In the unpaved portion of the right-of-way of Berkshire Drive, subject to obtaining necessary permits from Montgomery County, Maryland, the following conditions will exist:
    - A. An approximately four foot wide concrete sidewalk will be installed in the Berkshire Drive right-of-way. The sidewalk will be extended beyond the southern limits of the Subject Property to connect to an existing staircase that provides access to the Wildwood Shopping Center.
    - B. Street trees will be planted in the Berkshire Drive right-of-way, per Montgomery County specifications, between said sidewalk and the street curb.
    - C. Existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.
  4. Landscaping shown on the companion "Landscaping Plan" (Sheets LS-1 & LS-2) is intended to provide, among other things, a slightly, all season, green buffer along the Berkshire Drive right-of-way. The landscaping shown is illustrative only. Final locations, sizes and species of landscape materials will be determined at the time of site plan review.
  5. At the time of site plan review, the applicant will have selected, and will use exclusively, a name or identifier for the project which will not include the word "Wildwood" in the title.

In addition, Petitioner has agreed to conditions recommended by the Planning Board (Exhibit 45) for inclusion in this special exception, if it is granted by the Board of Appeals. They are incorporated into the conditions recommended in Part V of this report.

Technical Staff concluded that, "The proposed development is generally consistent with all applicable standards of the O-M zone and applicable requirements of the Zoning Ordinance and is in accord with the land use recommendations of the North Bethesda/Garrett Park Master Plan." Exhibit 20, p. 2. Staff also noted that if the SDPA is approved by the County Council and the special exception is approved by the Board of Appeals, the proposed development will be subject to preliminary plan amendment and site plan amendment review by the Planning Board.

### 3. Landscaping, Lighting and Signage:

**a. Landscaping:** The revised Landscaping Plan (Exhibit 26(b)(i)) is reproduced below:

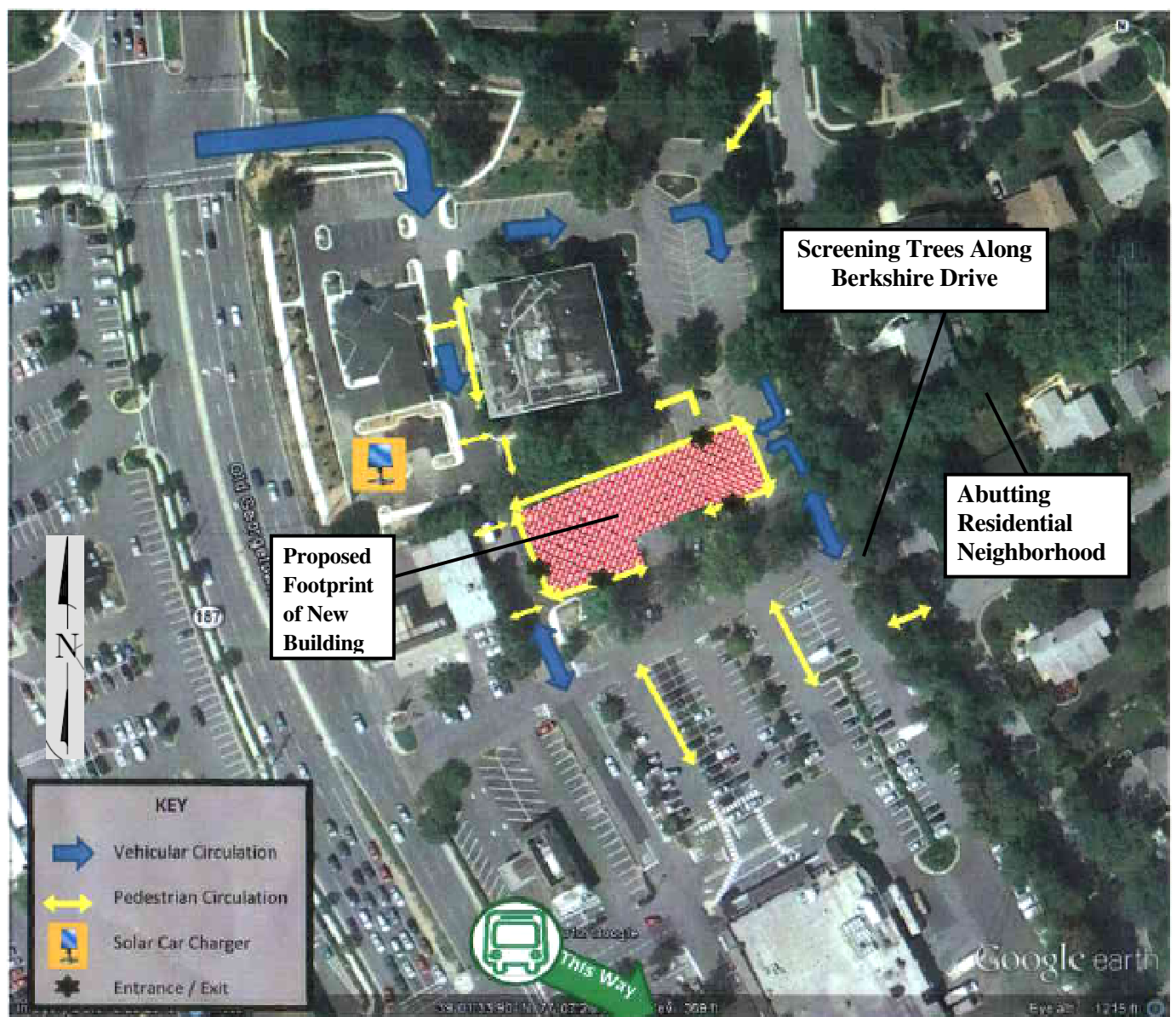




LANDSCAPE PLANT LIST								
KEY	QTY	BOTANICAL NAME	COMMON NAME	CAL	HGT	SPD	ROOT	SPACING / NOTES
<b>SHADE TREES</b>								
AF	7	Acer x freemanii 'Jeffersred'	Autumn Blaze Maple	2½ -3"			B#B	
AR	4	Acer rubrum 'October Glory'	October Glory Red Maple	2½ -3"			B#B	
QP	6	Quercus phellos	Willow Oak	2½ -3"			B#B	
UA	4	Ulmus americana 'Valley Forge'	Valley Forge Elm	2½ -3"			B#B	
<b>EVERGREEN &amp; DECIDUOUS CONIFER TREES</b>								
PF	3	Pinus flexilis 'Vanderwolf Pyramid'	Vanderwolf Pyramid Lumber Pine		8-10'		B#B	
TM	19	Thuja occidentalis 'Techny'	Mission Arborvitae		6-7'		Cont.	
TO	8	Thuja occidentalis 'Techny'	Mission Arborvitae		4-5'		Cont.	
IF	11	Ilex x attenuata 'Fosteri'	Fosters Holly		6-7'		B#B	
IN	8	Ilex 'Nellie R. Stevens'	Nellie Stevens Holly		6-7'		B#B	
PA	3	Picea abies	Norway Spruce		8-10'		B#B	
<b>ORNAMENTAL TREES</b>								
AC	3	Amelanchier canadensis 'Sprizam'	Sprizam Serviceberry		8-10'		B#B	
CC	2	Cercis canadensis	Eastern Redbud		8-10'		B#B	
CK	6	Cornus kousa	Kousa Dogwood		8-10'		B#B	
LI	7	Lagerstroemia indica 'Natchez'	Natchez Crape myrtle		6-8'		B#B	
PO	4	Prunus x incame 'Okame'	Okame Cherry		8-10'		B#B	
<b>DECIDUOUS SHRUBS</b>								
AE	22	Abelia x 'Edward Goucher'	Edward Goucher Abelia		24-30"		Cont.	36" o.o.
IV	16	Itea virginica 'Little Henry'	Little Henry Sweetspire		24-30"		Cont.	36" o.o.
RR	12	Rosa 'Radrizz'	Red Knock Out Rose		24-30"		Cont.	36" o.o.
SN	15	Spiraea nipponica 'Snowmound'	Snowmound Spirea		24-30"		Cont.	36" o.o.
VC	5	Viburnum carlesii	Koreanspice Viburnum		30-36"		Cont.	60" o.o.
VD	4	Viburnum dentatum 'Ralph Senior'	Autumn Jazz Viburnum		30-36"		Cont.	60" o.o.
<b>EVERGREEN SHRUBS</b>								
AZ	13	Azalea 'Delaware Valley White'	Delaware Valley White Azalea			18-24"	Cont.	36" o.o.
	13	Azalea 'Mothers Day'	Mothers Day Azalea					
IC	14	Ilex crenata 'Green Lustre'	Green Lustre Japanese Holly			18-24"	Cont.	36" o.o.
PL	41	Prunus laurocerasus 'Otto Luyken'	Otto Luyken Cherry laurel		30-36"		Cont.	48" o.o.
TB	12	Taxus baccata 'Repandens'	English Spreading Yew			30-36"	B#B	60" o.o.
<b>ORNAMENTAL GRASSES &amp; GROUNDCOVERS</b>								
CA	4	Calamagrostis x scutiflora 'Karl Foerster'	Feather Reed Grass				#2 Cont.	30" o.o.
LM	370	Liriope muscari 'Big Blue'	Big Blue Lilyturf				4" Pots	12" o.o.
PH	26	Pennisetum alopecuroides 'Hameln'	Dwarf Fountain Grass				#1 Cont.	30" o.o.
<b>HERBACEOUS PERENNIALS</b>								
SS	12	Salvia x sylvestris 'Mainacht'	May Night Sage				#1 Cont.	18" o.o.
HA	19	Sedum (Hylotelephium) x 'Autumn Joy'	Stonecrop				#1 Cont.	18" o.o.

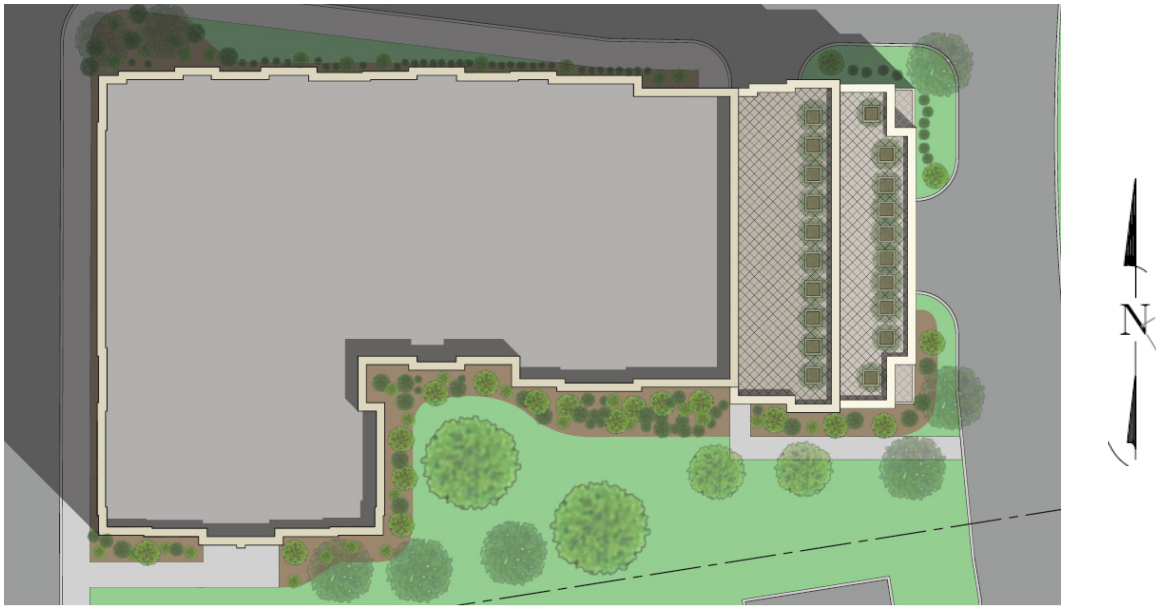
Landscaping of the site is clearly very important to the neighborhood because it provides screening of the commercial area. The Wildwood Manor Citizen's Association (WMCA) withdrew its earlier opposition based on changes Petitioner agreed to in its plans, as described by WMCA's representative, Ann Bryan (Tr. 10-21). Ms. Bryan testified that there will be a green space at least 30 feet wide as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, which currently faces Berkshire Drive, and to screen the lower portions of the building. Within

this green space, the only land uses will be an approximately 6-foot high board-on-board fence, shade trees and evergreen plantings on both sides of the fence, selected and located to block this headlight glare. Street trees will be planted on the Berkshire Drive right-of-way between the sidewalk and street curb, and existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable. That preservation of existing screening is significant because there is already substantial existing landscape screening of the site, as best reflected in Exhibit 43, an aerial photograph intended to demonstrate site circulation:



These protections for the neighborhood are contained mostly in binding elements set forth on pages 19-21 of this report, and to some extent in the design criteria also quoted above. In response to Hearing Examiner Robeson's question at the hearing, Ms. Bryan testified that Petitioner had made all the amendments to the plans consistent with what the community wishes to see. Tr. 17-18. She observed that these changes will mitigate much of the aesthetic impact of Petitioner's proposals.

As noted by Ms. Bryan and depicted in Exhibit 36, reproduced on page 14 of this report, there will also be planters containing trees located on the staged rooftops over the third and fourth stories. The planters and types of trees, which will be six to seven feet high at time of planting, are shown below in a rendered "Roof Landscaping Plan" (Exhibit 39):



A binding element requires that the Petitioner make the rooftop landscaping a condition for the grant of the special exception, and such a condition is recommended in Part V of this report.

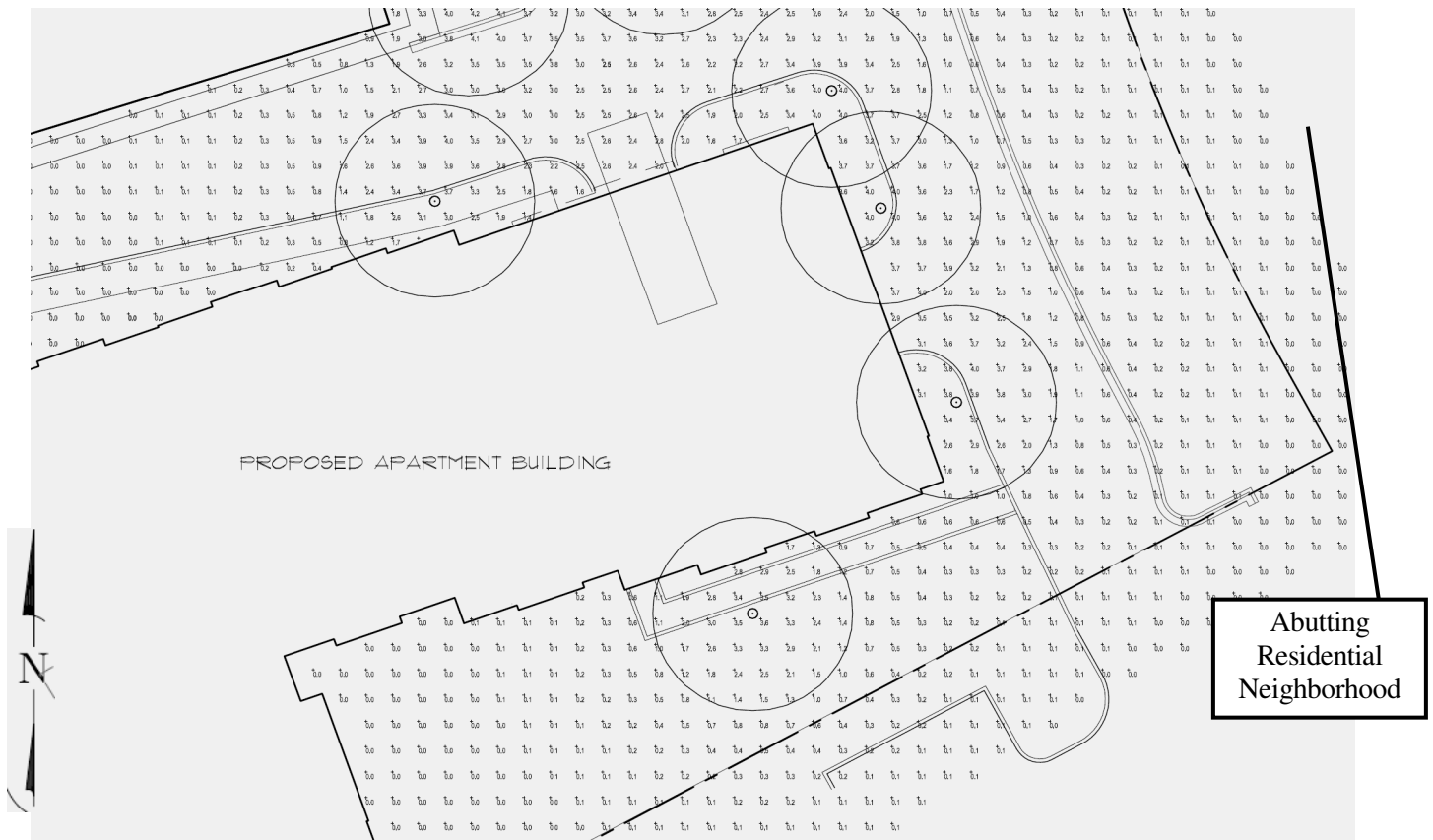
**b. Lighting:**

Zoning Ordinance §59-G-1.23(h) provides:

***(h) Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Although the site is not in a residential zone, this provision also controls light which “intrudes into adjacent residential property.” Petitioner filed a Photometric Lighting Plan (Exhibit 6(d)), which indicates that, for the most part, lighting that borders residential areas will not exceed 0.1 footcandles. The portion of the Plan which shows the side of the proposed building adjacent to the residential zone along Berkshire Drive is reproduced below:



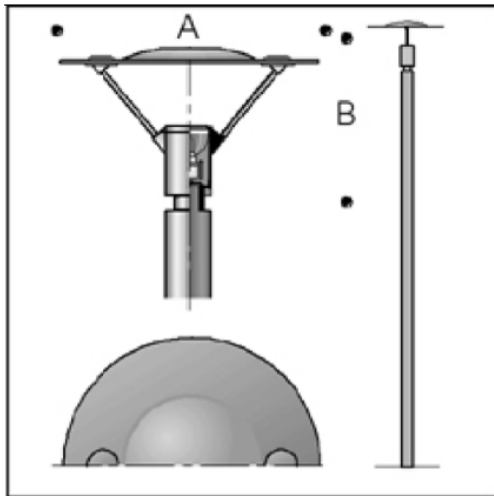
While there are minor exceedances in parts of the Photometric Lighting Plan, none of those exceedances are located between the proposed building and the adjacent residential zone. Moreover, the exceedances that do exist elsewhere on the site are located in areas around driveways, entrances or parking lots, where safety would dictate the need for adequate lighting in the commercial zone.

The Photometric Lighting Plan also contained diagrams of proposed lighting fixtures and tables for implementation:

LIGHTING LEGEND					
FIXTURE	BRAND	MODEL NUMBER	WATTS	POLE HEIGHT	DIMENSIONS (AXB)
A	BEGA	8309MH	150 W	14'	39.375" X 24.25"

Calculation Summary										
Label	CalcType	Units	Avg	Max	Min	Avg/Min	Max/Min	# Pts	PtSpcLr	PtSpcTb
Grade Emulation_Planar	Illuminance	Fc	1.05	4.6	0.0	N.A.	N.A.	6224	5	5
Luminaire Schedule										
Symbol	Qty	Label	Arrangement	Lumens	LLF	Description				
⊙	40	8309MH	SINGLE	14000	0.720	8309MH, 150 T6 G12				

LIGHT FIXTURE A



It should be noted, however, that the details of the lighting plan will be determined by the Planning Board at site plan review, as specified in Design Criterion 2, also quoted on page 22 of this report:

2. New freestanding lighting fixtures will be the same as, or similar to existing lighting in terms of style, height, and wattage. Any lighting fixtures affixed to or associated with the residential building on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.

Lighting does not appear to have been a concern raised by any party to this case, and Technical Staff stated that “The proposed lighting is similar to the existing fixtures and provides a safe environment but

will not cause excessive glare or spill-over toward the residential areas.” Exhibit 20, p. 13. Staff revisited the issue on page 20 of its report, stating “All exterior lighting will be installed and maintained in a manner not to cause glare or reflection into abutting properties.” Finally, Staff stated (Exhibit 20, p. 24):

The lighting plan adequately and efficiently covers the main vehicular access to the site, as well as the parking, and loading areas; in order to create a safe vehicular and pedestrian environment. The lighting levels do not exceed 0.1 foot candles along the northern and eastern boundaries of the site.

Given the fact that the subject site is not in a residential zone and Staff’s finding that the proposed lighting will not cause glare into adjoining residential properties, the Hearing Examiner recommends that the Board of Appeals approve the lighting plan, even if it contains small lighting exceedances, to the extent the Planning Board finds that such exceedances are appropriate for this mixed use area, as authorized by Zoning Ordinance §59-G-1.23(h) “*to improve public safety.*”

**c. Signage:**

Petitioner has not proposed any signage on the special exception plan at this time. As noted by Technical Staff (Exhibit 20, p. 24), any signage proposed by Petitioner must comply with Chapter 59-F of the Zoning Ordinance. Moreover, if signage is added to the site, an amended special exception site plan must be filed with the Board of Appeals, so indicating. In addition, Petitioner has agreed that, at the time of site plan review, it will have selected, and will use exclusively, a name or identifier for the project which will not include the word “Wildwood” in the title. Tr. 19. This concession to the neighbors was agreed to in order to preserve the term in association with a single-family neighborhood. A condition has been recommended in part V of this report to reflect this agreement.

**4. Site Access and Circulation:**

An aerial photograph showing both vehicular (blue arrows) and pedestrian (yellow arrows) site access and circulation, was reproduced on page 25 of this report in connection with landscape screening.



That exhibit indicates that there will be sidewalks around the new building and that most vehicular traffic will enter on the north of the site from the extension of Rock Spring Drive across Old Georgetown Road.

Site access and circulation was an issue raised by a number of community members because of their concern about pedestrian safety, especially the safety of children walking from the neighborhood to Walter Johnson High School. *See, e.g.*, Exhibit 21 (letter of Andrea Gabossy); Exhibit 51 (letter of Melitta Carter); and the testimony of Melitta Carter (Tr. 211-224).

This neighborhood concern was described well by Ms. Carter at the hearing (Tr. 212-217):

She suggested that, if the building were an office building, as originally proposed, traffic would predominately be generated between 9:00 a.m. and 5:00 p.m. With a residential building, assuming that most people will be going to work, people may be leaving from 6 o'clock onwards. Although there is a bus for middle school and elementary school children, there is not one for high school. She testified that between 7:00 a.m. and 7:30 a.m., there are many students "half asleep" walking across the parking lot behind the shopping center. They come in from Cheshire Drive, Avon Drive, Rossmore Drive, Yorkshire, Chatsworth and further along, as well Aubinoe Farm – a progression coming east to west for about a half hour between 7:00 a.m. and 7:30 a.m., her children included, heading to Walter Johnson.

Although there are three traffic lights at which they can cross, they don't always make the best decisions as to where to cross, and the traffic makes it dangerous, especially when it is still dark in the winter mornings. According to Ms. Carter, the Cheshire Drive intersection with Old Georgetown Road is the busiest because everybody is coming up from Grosvenor Lane and from the whole residential area. She believes there will be a direct conflict of cars coming from the site and high school students who are half asleep, walking in the opposite direction, the drivers north-south and the pedestrian east-west. There are pedestrian crosswalks on the west side of the shopping center, but there are no pedestrian crosswalks on the east side of it (*i.e.*, behind the shopping center). There are speed bumps there, but she says that people zigzag around them. There are no official County speed signs there, either. Tr. 212-217.

Ms. Carter also testified that the four-way stop at Cheshire Drive and the Wildwood Shopping Center southern access is failing (Tr. 220):

. . . This is a horrible corner between about 7:45 a.m. and 9:30 a.m. in the morning, and you have multiple road rage incidents there. You have people coming from Grosvenor who do not wait their turn to stop because they want to get through to that traffic light before it goes red again. You just add another 10 cars, just 10 cars into there, and there are going to be other incidents. So my request is that there is no vehicular traffic access into Wildwood Shopping Center from the site. And this can include cutting off the bank and the medical building, ensuring that all traffic has to enter via Rock Spring. Pedestrian access is different, it can be pedestrian access. But I think if you restrict the access to Rock Spring, you're going to avoid potential high school student car conflict. You're going to avoid generating more traffic at that four way stop and at Cheshire Drive. And you will also, I think, decrease certain parking, potential parking issues.

In Ms. Carter's view, this potential problem can be avoided by installing barriers at the southern end of the subject site that will prevent the residents of the new building from accessing the shopping center by vehicle. Exhibit 51.

In contrast to Ms. Carter's testimony, Petitioner's expert witnesses testified that residents of the proposed building are unlikely to use Cheshire Drive (*i.e.*, the exit all the way to the south of the Wildwood Shopping Center) to exit the site, nor to use the area behind the shopping center to move from north to south. Thus, the site circulation problem she envisions is unlikely to occur.

Petitioner's architect, Sassan Gharai, testified that most people are likely to enter the site from the north, off of Old Georgetown Road at Rock Spring Drive, and come south through the site. There is no vehicular connection between Berkshire Drive and the property; there is only a pedestrian connection. Tr. 49-52. He added that most people from the apartment building are going to leave the site in two main ways. For those going north, or onto I-270, they can exit at Rock Spring Drive, north of the site, and for those going south or west or onto I-495, there is a six-lane access road that is just south of the gas station that allows traffic to continue straight ahead, through a traffic light, onto Democracy Boulevard, or to turn north or south onto Old Georgetown Road. In his opinion, the occupants of the subject site are not likely to progress through the shopping center to its southern exit onto Cheshire because they have

the other larger exit available just south of the proposed building, across from Democracy Boulevard. People can also enter the site by using the access across from Democracy Boulevard. Mr. Gharai noted that the parking to the rear of the shopping center is mostly employee parking, delivery trucks and dumpsters, and most of the people who come to the center do not actually park there. Tr. 259-278. Mr. Gharai also opined that the access points and site circulation will operate safely. Tr. 293-294.

Mr. Gharai's views were supported by Petitioner's transportation planner, Craig Hedberg. Mr. Hedberg stated that in his professional opinion, this project will be served adequately by existing facilities and the transportation network since there is very good access to major roadways, arterials, all the way up to freeways, and Petitioner has provided local access improvements to add capacity at the principal access point right opposite Rock Spring Drive. He also opined that the internal circulation is safe and adequate. Tr. 158.

Mr. Hedberg further testified about the primary vehicular circulation that is anticipated for visitors and residents of this project. He stated that he focused on the access from Old Georgetown Road because it is a major highway intersecting with other major highways, Democracy Boulevard, Rock Spring Drive, and the I-270 spur interchanges. He noted that the shopping center has speed bumps, stop signs, crosswalks and pedestrians, which make entry from the south (*i.e.*, from Cheshire Drive) very circuitous, with a lot of local internal friction. Thus, while it is possible for people to access the site from the south and weave through the shopping center, in his professional judgment, it is much better to access the site via Old Georgetown Road. There is no access from Berkshire Drive. Tr. 150-152.

When asked by Hearing Examiner Robeson why there needs to be an access to the site from the south if nobody is going to use it, Mr. Hedberg stated that he didn't want to discourage internal trips to access retail (or other convenient uses) or force traffic out on the highway for these very short trips. Tr. 153-156.

Technical Staff addressed access and circulation in its report (Exhibit 20, p. 14):

Access to the site will continue to be provided via a driveway from Old Georgetown Road, but will be modified by this application for safer circulation to ensure accessibility for emergency vehicles. The layout will continue to provide access to the adjacent commercial parking lot; no direct vehicular access is provided to Berkshire Drive. New sidewalks along both frontage roads and through the interior of the site will connect the site to nearby neighborhoods and shopping areas.

Staff concluded (Exhibit 20, p. 22): “. . . There is no evidence that the use will reduce the safety of vehicular or pedestrian traffic. Access points from Old Georgetown Road are deemed to be safe and efficient and on-site vehicular and pedestrian circulation systems shown on the application are adequate.”

While the Hearing Examiner understands the concerns expressed by the community regarding pedestrian safety, ALL of the expert evidence (Mr. Gharai; Mr. Hedberg and Technical Staff) concluded that the site access and circulation would be safe. The Hearing Examiner finds that the testimony of Messrs. Gharai and Hedberg is logical in predicting the likely path of those exiting the site to go southbound on Old Georgetown Road. Why should people prefer to deal with all the stop signs and speed bumps within the shopping center to get to Cheshire Drive, if that intersection is malfunctioning in the way Ms. Carter describes (*i.e.*, bound up with traffic during the peak periods)? It seems logical that they would exit at the controlled intersection of Old Georgetown Road and Democracy Boulevard.

Given this evidence, the Hearing Examiner does not recommend installing barriers at the southern end of the subject site that will prevent the residents of the new building from accessing the shopping center by vehicle. Such a restriction would prevent those residents from using the logical exit at Old Georgetown Road and Democracy Boulevard when they wish to proceed southbound on Old Georgetown Road or westbound on Democracy Boulevard. It would thereby unduly increase congestion at the northern exit at Old Georgetown Road and Rock Spring Drive, all to prevent an evil (additional congestion at Cheshire Drive) which is not likely to occur according to all the expert evidence.

The Hearing Examiner raised the possibility in his Order of August 21, 2012 (Exhibit 50) of imposing a condition that would require stop signs and crosswalks at the two southern access points to the

site. That Order invited comments from all interested parties regarding that possibility. Petitioner responded with an aerial photo showing the locations of existing stop signs near the southern accesses to the site (Exhibit 59(a)), and also opined that additional stop signs were unnecessary because “automobile traffic is already controlled so that vehicular and pedestrian conflicts are minimized or eliminated.” Exhibit 59. The only other response on that issue was from Ms. Carter, who also suggested that stop signs at the southern end of the subject site would not be particularly helpful in addressing the community’s concerns. Exhibit 51.

Given this response, the Hearing Examiner does not recommend a condition imposing a requirement for additional stop signs. The issue of site access and circulation will also be addressed at site plan review regarding the SDPA, and the Hearing Examiner is confident that the Planning Board will require such on-site traffic control devices as are needed to ensure pedestrian safety.

Based on this record, the Hearing Examiner finds that site access and circulation for the site will be safe and adequate.

#### **5. Public Facilities (traffic congestion, parking and school overcrowding):**

In this case, Technical Staff reports (Exhibit 20, p. 9):

Public facilities and services are available and will be adequate to serve the proposed development. The property is served by public water and sewer systems. The application has been reviewed by the Montgomery County Fire and Rescue Service which has determined that the Property has appropriate access for fire and rescue vehicles. Other public facilities and services, such as police stations, firehouses, and health services, are operating according to the Subdivision Staging Policy resolution currently in effect and will be adequate to serve the Property. Electrical, gas, and telecommunications services are also available to serve the Property.

Although the site has already been subdivided, Technical Staff notes that “[i]f approved, the special exception will require approval of an amended preliminary plan of subdivision. Roads and schools will be further addressed per the subdivision staging policy in effect at that time. . . .” Exhibit 20, p. 21. Therefore, under Zoning Ordinance §59-G-1.21(a)(9)(A), it is the Planning Board and not the Board of Appeals, which must ultimately determine the adequacy of public facilities. This section also

requires that in such cases, “approval of a preliminary plan of subdivision must be a condition of granting the special exception.” A condition to this effect is recommended in Part V of this report. It should be noted that there will also be site plan review by the Planning Board if the Council approves SDPA 12-1.

Nevertheless, four issues regarding public facilities were raised by the community in this case (traffic congestion, availability of parking, school overcrowding and stormwater management). The Hearing Examiner will address these issues in the context of compatibility with the neighborhood. Although parking on private property is not technically a “public facilities” issue, the Hearing Examiner will address parking concerns in this section. Stormwater management will be discussed in the section of this report (Part II. E.) which addresses environmental issues.

**a. Traffic Congestion:**

One of the chief concerns of the community is the possibility that adding the proposed building will increase traffic congestion in the neighborhood, especially at the intersection of Old Georgetown Road and Cheshire Drive, and at the intersection of Old Georgetown Road and Democracy Boulevard. See Exhibits 21, 30 and 49(a); and the testimony of Melitta Carter (Tr. 211-224), Patricia Broderick (Tr. 224-228), Wendy Calhoun (Tr. 229-233), Andrea Gabossy (Tr. 234-242), and Brenda Sandler (Tr. 242-248). These witnesses emphasized that traffic congestion is awful at the Cheshire Drive intersection because traffic from both their neighborhood and Grosvenor Lane feed into Cheshire Drive at this point, as well as the traffic leaving the southern end of the Wildwood Shopping Center. With regard to the other intersection of concern, Ms. Sandler noted that according to the Montgomery County Planning Department’s 2011 Mobility Assessment Report, the worst intersection in Montgomery County is the intersection of Democracy Boulevard and Old Georgetown Road in Bethesda. Tr. 246.

Petitioner’s evidence addressed traffic issues in general and the problems at both intersections. Petitioner’s primary point is that the peak-hour traffic which will be produced by the proposed residential building will be much less than the traffic which would have been produced by the office building



previously approved for this location. Moreover, traffic generated by the proposed building is unlikely to aggravate the condition on Cheshire Drive because other, more convenient exists will be used by the residents.

Petitioner's expert in transportation planning, Craig Hedberg, testified that he was involved in the traffic study for the initial rezoning. That study included a two phase development. Phase 1 was the bank which has been constructed, and phase 2 was to be the 30,000 square foot office building, which the subject application is intending to modify.<sup>7</sup> No intersection improvements were required for the bank building because all intersections met the congestion standard, which is a Critical Lane Volume (CLV) of 1550 for this area.

Mr. Hedberg further testified that the then-proposed office building would have generated a sufficient number of trips that an improvement was required at the intersection of Old Georgetown Road and Rock Spring Drive, which aligned with the entrance to the subject site. When the first stage moved ahead, the State required that the Phase 2 improvement be acted on along with the bank approval. As a result, that improvement was installed ahead of schedule, and it increased the attractiveness and accessibility of the site opposite a signalized intersection onto Old Georgetown Road.

The previous proposal, the 30,000 square foot office building, would have generated 63 peak-hour trips. In the current modification, with the 58 apartment units, the trip generation drops to about 28 peak-hour trips, much lower than what was reflected in the original traffic study. With that drop in peak hour trips, no further traffic study was required since the property already had an approval for a higher ceiling. Tr. 145-147.

In response to Hearing Examiner Robeson's question, Mr. Hedberg discussed the intersection of Cheshire Drive and Old Georgetown Road, which was not a part of the original traffic study scope specified by Technical Staff; however, Technical Staff examined it in 2008 and found that the

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<sup>7</sup> The medical office building already existed on the site pursuant to a special exception granted in the 1960s.

intersection operated well within the congestion standard. He noted that there is a very short stacking distance between that intersection of Grosvenor coming into Cheshire and Old Georgetown Road. The stop signs and operational configuration cause the traffic congestion. "If you start with a clean slate, you know, we wouldn't lay out intersections so close, but that's the way the area has developed over time." Tr. 147-150.

As previously discussed in connection with the issue of site access and circulation, both Mr. Hedberg and Petitioner's architect, Sassan Gharai, testified that the occupants of the subject site are not likely to progress through the shopping center to its southern exit onto Cheshire Drive because they have a larger, more convenient exit available just south of the proposed building, across from Democracy Boulevard. Tr. 150-152; 259-278.

Mr. Hedberg stated that in his professional opinion, this project will be served adequately by existing facilities and the transportation network since there is very good access to major roadways, arterials, all the way up to freeways, and Petitioner has provided local access improvements to add capacity at the principal access point opposite Rock Spring Drive. Tr. 158.

Mr. Hedberg also addressed the assertion made by a number of neighbors that the intersection of Democracy and Old Georgetown Road was designated by the Montgomery County Planning Department's 2011 Mobility Assessment Report as the most congested intersection in Montgomery County. Tr. 246. According to Mr. Hedberg, that designation was the result of a calculation error due to a misplacement of numbers in the data sheet. Apparently, the Old Georgetown Road volumes were repeated for the Democracy Boulevard volumes, which completely threw off the calculation. Technical Staff checked this issue just before the hearing with the person that compiled that report and did a recalculation with the correct numbers. The recalculation, as indicated in the Planning Board minutes, revealed that the intersection operates well within the critical lane volume standard. Tr. 285.

The issue of traffic congestion was also addressed in the Technical Staff report (Exhibit 20, pp. 11-12):

Local Area Transportation Review (LATR)

Table 1 shows the projected net reduction in peak-hour trips generated by the replacement land use within the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.).

Table 1: Net Reduction in Peak-Hour Trips

<i>Land Uses</i>	<i>Square Feet Or Units</i>	<i>Site-Generated Peak-Hour Trips</i>	
		<i>Morning</i>	<i>Evening</i>
<b>Previously Approved General Office</b>	<b>30,000 sf</b>	<b>43</b>	<b>63</b>
<b>Proposed Mid-Rise Apartments</b>	<b>58 units</b>	<b>26</b>	<b>28</b>
<b>Net Reduction in Peak-Hour Trips</b>		<b>-17</b>	<b>-35</b>

In accordance with the *Local Area Transportation Review and Policy Area Mobility Review Guidelines*, a traffic study is not required to satisfy Local Area Transportation Review (LATR) test because the number of peak-hour trips generated by the proposed apartment building is less than the trips generated by the previously-approved office building. [Emphasis added.]

Table 2 below shows total number of peak-hour trips generated from the overall Wildwood Manor site:

Table 2: Total Overall Site Peak-Hour Trips

<i>Land Uses</i>	<i>Square Feet/Units</i>	<i>Site-Generated Peak-Hour Trips</i>	
		<i>Morning</i>	<i>Evening</i>
<b>Proposed Mid-Rise</b>	<b>58 units</b>	<b>26</b>	<b>28</b>
<b>Existing Medical Office</b>	<b>36,423sf</b>	<b>90</b>	<b>135</b>
<b>Existing Bank</b>	<b>3,470sf</b>	<b>6</b>	<b>24</b>
<b>Total Peak-Hour Trips</b>		<b>122</b>	<b>187</b>

The result of the traffic study prepared for the 2008 approval was that the intersection of Old Georgetown Road and Rock Spring Drive/Wildwood Manor Driveway exceeded its congestion standard. The required intersection improvement – a second westbound approach lane on Wildwood Manor Driveway at the intersection with Old Georgetown Road – has been completed.

### Other Nearby Traffic Conditions

The two nearby intersections with Old Georgetown Road at Democracy Boulevard/Wildwood Shopping Center Driveway and Cheshire Drive did not exceed their CLV congestion standard. An operational problem exists at the closely-spaced intersections along Cheshire Drive at Old Georgetown Road and at Grosvenor Lane-Wildwood Shopping Center Driveway. Limited storage for the westbound Cheshire Drive traffic between Old Georgetown Road and at Grosvenor Lane-Wildwood Shopping Center Driveway causes backups during peak hours. Another external traffic impact is the projected increase on Old Georgetown Road of approximately 1.6% by the expanded National Naval Medical Center (and renamed Walter Reed National Military Medical Center). **The existing traffic problems, however, are not adversely impacted by the proposed apartment building that replaces the previously-approved office building and generates fewer site-generated peak-hour trips.** [Emphasis added.]

### Policy Area Mobility Review (PAMR)

Under the current *Subdivision Staging Policy*, a revised PAMR test will be required at preliminary plan review because the number of new peak-hour trips generated by the proposed apartment building is less than the new trips generated by the previously approved office building. The previously required mitigation of 25 new peak-hour trips is reduced to 14 new peak-hour trips.

In 2008, the Applicant was required to provide non-auto transportation improvements such as handicapped ramps and static transit information signs. The revised APF test would be to pay \$11,000 (i.e., amount is based on the original subdivision filing date) times the 14 new PAMR trips equaling at least \$154,000 towards the cost of non-auto transportation improvements. As described in the recommended conditions, off-site non-auto transportation improvements must be identified, located within the North Bethesda Policy Area, and approved by MCDOT, State Highway Administration (SHA), and/or Department of Permitting Services (DPS) prior to certification of the amended site plan. These improvements must be implemented prior to release of any building permit.

Thus, all of the expert evidence concludes that “The existing traffic problems . . . are not adversely impacted by the proposed apartment building that replaces the previously-approved office building and generates fewer site-generated peak-hour trips.”<sup>8</sup> Exhibit 20, p. 12. Unlike most special exceptions, we are not evaluating merely the potential impacts on the community of the proposed residential building; rather, we must compare those potential impacts with the impacts of the previously proposed office building which was approved by the Council on November 27, 2007 in LMA G-851 for placement at this location. Since Petitioner has the right to erect that office building, and that building

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<sup>8</sup> Technical Staff informed the Hearing Examiner that the Planning Board’s February 5, 2009 finding of adequate public facilities for the site, including the previously proposed office building, was valid until February 5, 2014. Exhibit 46.

would clearly have had impacts on traffic, parking, pedestrian safety and stormwater management in the neighborhood, the real question we must answer is whether the newly proposed residential building will have non-inherent adverse effects (or a combination of inherent and non-inherent adverse effects) on the neighborhood greater than the adverse effects likely to result from the previously proposed office building (*i.e.*, will the neighborhood be worse off with residential building than with the office building), and if so, is the difference sufficient to warrant rejection of the proposed special exception.

While some of the community witnesses recognize the need to make this comparison, there is a natural tendency to compare the possible adverse effects of the proposed residential building with the existing conditions (*i.e.*, no building located on the southern end of the site). That kind of comparison is unfair to the Petitioner, who has a right to make use of its property, a right previously authorized by the Council. It is clear that traffic will be increased over existing conditions by the addition of a new building, but all the expert evidence is to the effect that the increase in peak-hour traffic from the proposed residential building will be significantly less than the increase in traffic that would have been expected from an office building. Technical Staff and the Planning Board will have the opportunity to consider these issues again at site plan and amended preliminary plan review.

Based on this record, the Hearing Examiner finds that the traffic generated by the proposed building will not have adverse effects on the neighborhood greater than, or even equal to, the effects that would occur if the previously approved office building were erected on the site.

**b. Adequacy of Parking Provided:**

The number of parking spaces required on site is established by Zoning Ordinance Sections 59-G-2.36.2(b)(4), 59-E-3.7 and §59-E-3.1(a).

Section 59-G-2.36.2(b)(4) provides:

*(4) A minimum of one (1) on-site parking space per dwelling unit must be provided. Additional parking spaces must be provided up to the total required by the relevant standards of Section 59-E-3.7, except that the Board may approve shared parking in*

*accordance with the provisions of Section 59-E-3.1 to accommodate these additional spaces.*

Section 59-E-3.7 provides, in relevant part:

***Dwelling, multiple-family.*** *For each dwelling unit with no separate bedroom, one space; for each dwelling unit with one separate bedroom, 1 ¼ spaces; for each dwelling unit with 2 separate bedrooms, 1 ½ spaces;. . .*

Section 59-E-3.1 applies to mixed uses, and provides a method for computing shared parking:

*(a) When any land or building is under the same ownership or under a joint use agreement and is used for 2 or more purposes, the number of parking spaces is computed by multiplying the minimum amount of parking normally required for each land use by the appropriate percentage as shown in the following parking credit schedule for each of the 5 time periods shown. The number of parking spaces required is determined by totaling the resulting numbers in each column; the column total that generates the highest number of parking spaces then becomes the parking requirement.*

	Weekday		Weekend		Nighttime
	Daytime (6 am-6 pm)	Evening (6 pm-midnight)	Daytime (6 am-6 pm)	Evening (6 am-midnight)	(Midnight-6 am)
Office/Industrial	100%	10%	10%	5%	5%
General Retail	60%	90%	100%	70%	5%
Hotel, Motel, Inn	75%	100%	75%	100%	75%
Restaurant	50%	100%	100%	100%	10%
Indoor or Legitimate Theater, Commercial Recreational Establishment	40%	100%	80%	100%	10%
Meeting Center	50% <sup>1</sup>	100%	100%	100%	10%
Multi-family dwellings in Commercial Districts	50%	100%	100%	100%	100%
Personal Living Quarters	50%	100%	100%	100%	100%
All Other Uses	100%	100%	100%	100%	100%

<sup>1</sup> The Board of Appeals may reduce this parking requirement in areas where public parking is available or when the meeting center will be utilized only by other commercial or industrial uses which are located within 800 feet of the meeting center and provide their own parking spaces.



(b) *The following conditions apply to any parking facility for mixed use development:*

*(1) The mixed use property and shared parking facility must be owned by the same developer/owner, or under a joint use agreement. Parking must be located within 500 feet walking distance of the entrance to the establishment to be served. Any parking arrangement under a joint use agreement must meet the off-site parking facility requirements of Sec. 59-E-3.4.*

*(2) Reserved spaces may not be shared.*

*(3) The Director/Planning Board must determine, at the time of parking facility plan approval that shared parking is possible and appropriate at the location proposed. Particular attention is needed to assure that sufficient and convenient short-term parking will be available to commercial establishments during the weekday daytime period. The shared parking spaces must be located in the most convenient and visible area of the parking facility nearest the establishment being served.*

*(4) A subsequent change in use requires a new use-and-occupancy permit and proof that sufficient parking will be available.*

Petitioner proposes that, following completion of the proposed residential building, the subject site will provide a total of 225 parking spaces to serve the entire site (111 surface parking spaces that currently serve the existing medical office building and bank, and 114 garage spaces underneath the new residential building). As described by Technical Staff, the parking structure underneath the proposed apartment building will be designed such that parking for the residential units will be isolated from parking accessible for visitors to the apartment building and patrons/employees of the two office buildings on site. The upper level of the parking structure, which is presently designed to provide 47 spaces, will be freely accessible for visitors or office employee vehicles. The lower level will provide 67 spaces and will be designated as secure parking for the residential units, thereby ensuring sufficient parking for the 58 dwelling units. Vehicular access to the lower level will be restricted by a gated access point located within the parking structure. Exhibit 20, p. 5.

Members of the adjacent residential community and some tenants of the on-site medical office building raised concerns about the adequacy of the proposed parking, since the construction of the new building will eliminate some of the existing surface parking.

For example, Andrea Gabossy testified that she lives at 6213 Berkshire Drive in Bethesda, directly across Berkshire Drive from the subject site. Ms. Gabossy is very concerned about parking,

because should there be overflow, she will be directly impacted. She stated that the parking lot is usually full to the north end of Balducci's. During the day and on weekends, people sometimes park in front of her house or near Yorkshire Drive, where there are pedestrian entrances. Tr. 234-236.

Another neighbor, Brenda Sandler, noted that there would not be enough parking for the new building to meet regulations without employing the shared-parking concept. She feels that there still will not be enough unrestricted parking spaces available. Tr. 243-244. Ms. Sandler further testified that there is a lack of parking spaces, and during the day, the front and back of the shopping center are full. People are currently parking where the footprint of the apartment building will be, so she reasoned that there will be spillover when the building is built. The impact on the community would be additional parking on Berkshire Drive, which is narrow. Tr. 245.

Petitioner's architect, Sassan Gharai, opined that parking is only a big issue near Balducci's on Thanksgiving and Christmas. Tr. 56-58. When questions about the shared parking were raised by tenants of the existing medical building, Mr. Gharai responded that parking is not needed for every tenant because people use other forms of transportation, and the residential parking needs are generally at different times than the medical parking needs. Tr. 86-89.

Petitioner also submitted recorded observations of parking on site made by one of its attorneys (Damon Orobona) at various times of the day. Mr. Orobona stated the following in his memorandum of June 8, 2012 (Exhibit 18(d)):

At the request of the applicant in Case Nos. SDPA 12-01 and S-2830, I made several site visits, at different times and on different days of the week, to the Wildwood Medical Center to observe actual parking conditions.

The parking conditions on the subject property have been documented a total of five times during the course of the past thirty days: twice in the morning, once midday, and twice during early evening hours. As the attached photographic exhibits indicate, the subject property contains ample available parking even during the busiest times of the day. The following chart provides a breakdown of the approximate utilization of the northern, eastern, and southern parking areas surrounding the current office building, as well as the utilization of the bank's parking area on the west side of the site:

	Northern Parking Area	Eastern Parking Area	Southern Parking Area	Bank Parking Area	Entire Site
Total Available Spaces	26	88	50	38	202
Estimated Count Morning 5/2/12; 9:00AM	14 (54% utilization)	30 (34% utilization)	16 (32% utilization)	13 (34% utilization)	73 (36% utilization)
Estimated Count Morning 5/8/12; 9:30AM	21 (81% utilization)	37 (42% utilization)	20 (40% utilization)	17 (45% utilization)	95 (47% utilization)
Estimated Count Midday 5/29/12; 2:00PM	20 (77% utilization)	42 (48% utilization)	18 (36% utilization)	31 (82% utilization)	111 (55% utilization)
Estimated Count Evening 4/23/12; 6:30PM	4 (15% utilization)	11 (13% utilization)	2 (4% utilization)	4 (11% utilization)	21 (10% utilization)
Estimated Count Evening 4/30/12; 6:00PM	6 (23% utilization)	11 (13% utilization)	4 (8% utilization)	5 (13% utilization)	26 (13% utilization)
Average Percent Utilization	50%	30%	24%	37%	32%

It is apparent that the property is most heavily utilized during the midday period, but there remains substantial parking spaces available (approximately 90 on May 29<sup>th</sup>) even during this period of peak demand. As the attached photos represent, the existing parking area is largely vacant during the morning and evening periods, and approximately half-empty midday.

Mr. Orobona also attached photographic evidence to support his observations (Exhibits 18(d)(1) – (d)(3)), some of which are reproduced on the following pages. They appear to support his observation that the parking facilities are currently underused.

Technical Staff did a thorough analysis of the on-site parking needs, correcting a number of errors in Petitioner's initial parking space calculations. Staff pointed out that, under Section 59-G-2.36.2(b)(4), parking spaces must be provided up to the total required by the relevant standards of Section 59-E-3.7, except that the Board of Appeals may approve shared parking in accordance with the provisions of Section 59-E-3.1. Absent shared-parking, the correct calculation of required parking under Section 59-E-3.7 is 1.25 spaces per 1-bedroom unit and 1.5 spaces per 2-bedroom unit, regardless of whether the units are productivity housing or not. Thus, Eighty-seven (87) spaces are required for the residential building and 247 for the overall site, if the shared parking calculation were not used. Exhibit 20, p. 17.

The photographs of current on-site parking conditions reproduced below and on the next page were attachments to Mr. Orobona's memorandum (Exhibit 18(d)):

EXHIBIT 1  
MORNING PARKING CONDITIONS AROUND 9:00AM ON MAY 2, 2012





EXHIBIT 5  
EVENING PARKING CONDITIONS AROUND 6:00PM ON APRIL 30, 2012



As is evident, these photos appear to support his observation that ample parking is currently available to serve the site.

The basis for Staff's calculation of required parking, without utilizing the shared-parking methodology, was set forth in its report (Exhibit 20, p. 23):

Proposed 58-unit Residential Building

2 1-bedroom @ 1.25 sp/du = 3 spaces  
56 2-bedroom @ 1.50 sp/du = 84 spaces  
 58 units (total) = 87 spaces required for Residential

Non-Residential Uses on Site

Existing Med. Office 5 /1K = 150 spaces  
 (30,000<sup>9</sup> sq. ft.)  
Existing Bank 2.7/1K  
(3,741 sq.ft.) = 10 spaces  
 Total = 160 spaces required for Non-Residential

Total Required on Site (absent shared parking) = 247 parking spaces

Technical Staff also set forth the manner of calculating the required number of parking spaces if the shared-parking calculation is approved by the Board of Appeals (Exhibit 20, p. 23):

<u>Section 59-E-3.1(a) Shared Parking Calculation</u>			
<u>Use</u>	<u>Base</u>	<u>Weekday</u>	
		<u>6am-6pm</u>	<u>% use</u>
<u>Office (Bank included)</u>	<u>160</u>	<u>160</u>	<u>100%</u>
<u>Residential</u>	<u>87</u>	<u>44</u>	<u>50%</u>
<u>Total</u>	<u>247</u>	<u>204</u>	
<b><u>Total Shared Parking Requirement</u></b>			<b><u>204</u></b>
<b><u>Total Parking Proposed</u></b>			<b><u>225</u></b>

Staff explained this shared parking calculation (Exhibit 20, p. 18):

The provision that the Board of Appeals (BOA) may approve shared parking allows the applicant to calculate under Section 59-E-3.1. Under Section 59-E-3.1, the shared parking provisions allow an Applicant to calculate parking based on a matrix covering various parking scenarios, namely, weekday, weekend, daytime, and evening. . . . The correct calculation should be 160 office spaces and 87 residential spaces. Testing

<sup>9</sup> Based on a precise survey of the existing building during the most recent renovation, 6,423 square feet of area previously counted towards the parking requirement has been removed as storage area as allowed under 59-E-3.7.



under the various parking scenarios, the scenario requiring the most uses must be accommodated. In this case, it is the weekday daytime scenario, which requires provision of at least 204 spaces. The Applicant is providing 225 spaces, which is above the minimum required. . . .

Petitioner provided six reasons and a summary stating why it feels that the shared-parking calculation is appropriate for this site (Exhibit 18(b), p. 3):

- a. The demonstrated parking patterns which indicate that existing uses do not exhaust the available parking spaces.
- b. The inherent complementary nature of a professional office building that is vacant in the evenings and weekends with a residential building in which many of the occupants leave during the day.
- c. The organization of the Applicant's parking garage which will make parking for the office users and visitors readily accessible while ensuring security for the residents of the building in a discreet, protected area of the parking garage, as described in more detail in an Amended Statement of Operations in Special Exception Case No. S-2830.
- d. The fact that public transportation with direct delivery to a METRO station (Grosvenor) is readily available within easy walking distance of the property. (In front of the Wildwood Shopping Center.)
- e. That virtually every conceivable service necessary for the residents of the proposed building (e.g., grocery stores, pharmacies, coffee shops, retail establishments, doctors' offices, school, church and restaurants) is within convenient walking distance of the building.
- f. The fact that "Required" parking is only nine (9) spaces more than actual "Provided" parking (236 required – 227 provided = 9).

In summary, the applicant believes that the proposed Aubinoe Residential Building represents a classic case when two uses (office, residential) have different periods of peak usage and that the segregation of parking by function within the residential building's parking garage will provide an attractive parking alternative to users of the office building in the event that remaining surface parking spaces . . . are not adequate to accommodate the parking needs for the two on-site office buildings with finite hours of operation.

In response, Technical Staff stated that it agreed with all but the last one (*i.e.*, the one labeled "f"), and concluded that "the minimum number of spaces are provided and supported by the

analysis.” Exhibit 20, p. 18. Staff also recommended a number of conditions to address parking issues (Exhibit 20, p. 16):

3. The Applicant must provide a minimum of 225 total parking spaces on-site;
7. At the time of the site plan amendment, the Applicant must provide the number and location of parking spaces for the proposed residences and existing office visitor/employees as required in the County Code and Zoning Ordinance while demonstrating security for the residential parking.
8. At the time of the site plan amendment, the Applicant must provide bicycle parking for visitors and residents as determined by the total number of units and unit types approved by the site plan.

The Planning Board endorsed Technical Staff’s recommendation to use the shared-parking calculation, stating (Exhibits 25 and 45, p. 3):

The Planning Board agrees with staff’s conclusion that the applicant’s proposal to use shared parking in accordance with the provisions of 59-E-3.7 adequately satisfies the parking requirement for the existing and proposed uses on the site. The total shared parking requirement is 204 spaces, while the applicant is proposing 225 total spaces. . . .

However, “. . . The Planning Board expressed concern about providing adequate on-site parking for non-residents who will be utilizing other services on the site (*i.e.*, bank, medical offices, etc.).” Exhibits 25 and 45, p. 3. For this reason, the Board recommended a condition to ensure that the upper level garage parking provided for employees, visitors, patients, etc., must be free parking.

11. The Applicant must not charge any parking fees for parking spaces within the apartment building that are not reserved for residents.

All of the conditions recommended by Staff and the Planning Board have been included in Part V of this report (with some minor rewording).

Based on this record, especially the evaluations of Technical Staff and the Planning Board, the Hearing Examiner finds that the number of parking spaces to be provided on site (225) will be adequate to meet the expected needs.

It is clear that the new residential building will eliminate part of a surface parking lot that is presently used on site, but the same would be true if an office building were constructed at that location.

It is not clear that the parking situation will be worse with the newly proposed building than it would have been with the originally planned office building. In fact, parking conflicts might have been exacerbated if two office buildings were erected on the site (*i.e.*, the existing medical office building and the previously planned office building) because the timing of their peak parking demands would have coincided more than those of a medical office building and a residential building. Tr. 86-89. We do know that the proposed number of parking spaces to be provided (225) will substantially exceed the 204 spaces required by the applicable shared-parking regulations. The Hearing Examiner agrees with Petitioner, Technical Staff and the Planning Board that the subject mixed-use site presents precisely the kind of situation where the shared parking calculation makes sense.

Based on the analysis of Technical Staff and the Planning Board, the Hearing Examiner recommends that the Board of Appeals approve the shared-parking calculation and authorize a total of 225 parking spaces for the site, conditioned as recommended by the Planning Board.

**c. School Overcrowding:**

One of the concerns expressed by a number of the neighbors was that the proposed apartment building would exacerbate school overcrowding in the area.

Wendy Calhoun, the President of the Ashburton Elementary School PTA, testified that all the elementary school aged children in the proposed apartment building will be going to Ashburton Elementary; the middle school children will go to North Bethesda; and the high school children will go to Walter Johnson. Ms. Calhoun is very concerned about existing and projected overcrowding in the schools. She observed that the Petitioner “can pay a fine to get around that, but that doesn’t solve the problem of where these kids go and it doesn’t pay for more teachers and more classrooms.” Tr. 228-232. Brenda Sandler also testified regarding her concern about the public school impact. She noted that the area schools are already at or above capacity. Tr. 242-243.

Petitioner's land planner, Victoria Bryant, testified that, based on the Technical Staff Report, there will be eight students generated by this proposal – three elementary, three middle and two high school students. She indicated that although the schools are over capacity, Petitioner will be making a school facilities fee payment, and the schools will accept the students. Tr. 171-173.

Technical Staff reported (Exhibit 20, p. 9):

The estimated student generation for this development is 3 elementary school students, 3 middle school students, and 2 high school students. The property is located in the service areas of Ashburton Elementary School, North Bethesda Middle School, and Walter Johnson High School. Enrollment at Ashburton Elementary School is projected to remain over capacity through 2017-18 school years. A feasibility study for an addition at the school is scheduled for FY 2013. Enrollment at North Bethesda Middle School also is projected to remain over capacity through the 2017-18 school years. A feasibility study for an addition at the school is scheduled for FY 2013. Enrollment at Walter Johnson High School is projected to exceed capacity in the 2016-17 and 2017-18 school years. There are currently no plans for an addition at this school.

The current Subdivision Staging Policy, school test for FY 2012 requires a school facility payment at the elementary and middle school levels. The FY 2013 school test, that goes into effect on July 1, 2012, will require a school facility payment at the middle and high school levels.

Staff also noted that roads and schools will be further addressed per the subdivision staging policy in effect at the time the Planning Board considers Preliminary Plan Amendment for this site. Ex. 20, p. 21.

The Planning Board made the following statement regarding this issue (Exhibits 25 and 45, p. 3):

In response to the school impact concerns raised by some of the opposing citizens, Commissioner Anderson requested additional explanation of how student generation estimates are calculated by the Montgomery County Public Schools (MCPS). Technical staff stated that student generation rates generally derive from census updates while utilizing various rates based on projected and existing housing stock in the County. Staff also noted that more specific information about schools is typically provided during the Adequacy of Public Facilities (APF) review which is a required Preliminary Plan finding.

School overcrowding is the one public facilities issue on which the previously proposed office building would not have had an impact, while the currently proposed residential building will have an impact. This is a legitimate community concern since the evidence of record indicates overcrowding in the area schools; however, school overcrowding, unlike traffic congestion and parking issues, is not a

compatibility issue in the traditional sense. Rather, it is a public facilities issue. In cases like the subject case, where a special exception use requires approval of a preliminary plan of subdivision (in this case an amended preliminary plan), Zoning Ordinance §59-G-1.21(a)(9)(A) requires that the Planning Board, not the Hearing Examiner or the Board of Appeals, must determine the adequacy of public facilities. As stated by Technical Staff, more specific information about schools will be required at the Adequacy of Public Facilities (APF) review during the Preliminary Plan review.

In any event, based on the current record, it appears that County policy, established by the Council and implemented by the Planning Board in its school capacity test, does not prohibit this kind of development despite area school overcrowding, but rather requires a school facility payment by the Petitioner.

In sum, the evidence introduced in this case supports the conclusion that Petitioner will be able to establish the adequacy of public facilities at the preliminary plan amendment review, and that neither traffic congestion nor parking will create conditions incompatible with the neighborhood.

#### **D. Master Plan**

The subject property lies within the area subject to the North Bethesda/Garrett Park Master Plan, approved and adopted in 1992. Petitioner's land planner, Victoria Bryant, testified that the 1992 Master Plan gives no specific guidance regarding this location. It does give general guidance in that there needs to be a variety of affordable housing, and more transit friendly development of mixed use areas, which is important for the whole of the Master Plan. She opined that the proposed development is substantially in accordance with the Master Plan and would comply with the purposes, standards and regulations of the zone. Tr. 105-108.

Technical Staff made similar findings (Exhibit 20, pp. 12-13):

The proposed development is consistent with recommendations in the Approved and Adopted (1992) North Bethesda-Garrett Park Master Plan. Although there are no specific recommendations in the Master Plan for subject property at 10401 Old

Georgetown Road, several land use objectives of the Master Plan will be implemented with this residential development, including increasing “the variety of housing stock, including affordable housing,” and encouraging “a mixture of land uses in redeveloping areas to promote variety and vitality” (p.33). Further, the location of the development along Old Georgetown Road is appropriate since it is within an area that is “best served by transportation infrastructure” (p.33). Old Georgetown Road is identified in the Master Plan as a Green Corridor. The Green Corridors policy is intended to address “the visual effects of roadways and abutting properties. The Green Corridors policy is recommended to “protect and enhance the residential character of the Planning Area” (p.250). The Applicant’s landscape plan should be modified at site plan to include street (shade) trees along the frontage of Old Georgetown Road.

The Planning Board adopted Technical Staff’s findings in this regard in its July 18, 2012, letter from Francoise Carrier to the Council conveying the Planning Board’s recommendation for approval of SDPA 12-1 (Exhibit 45(a), p. 1):

The Planning Board agrees with staff’s conclusions that the proposed amendment is in accord with the land use recommendations of the 1992 North Bethesda-Garrett Park Master Plan . . .

It should also be remembered that the Council reviewed the subject site only five years ago when it approved Resolution 16-392, rezoning it to the O-M Zone in LMA G-851. Attachment 11 to the Technical Staff report (Exhibit 20). On page 8 of that Resolution, the Council stated:

. . . The District Council agrees with the findings made by the Hearing Examiner, the Planning Board and Technical Staff that the proposed development would comply with the Master Plan. The proposed development would further many of the relevant goals in the Master Plan, including focusing development on areas with existing infrastructure, increasing variety and vitality among land uses, and encouraging a land use pattern that provides opportunities for housing and employment.

The present proposal would change only one aspect of the project being considered by the Council in 2007 when it found Master Plan compliance – it would substitute an apartment building, including 21 “productivity housing” units, for an office building. This change, if anything, would make the subject site more in tune with the Master Plan’s goal of “increas[ing] the variety of housing stock, including affordable housing.” Master Plan, p. 33.

It appears to the Hearing Examiner that all the evidence introduced in this case supports the proposition that the present proposal is consistent with the 1992 North Bethesda/Garrett Park Master

Plan. Given this record, the Hearing Examiner concludes that the proposed use is consistent with the goals of the Master Plan.

### **E. Environment (Including Stormwater Management)**

The only environmental issue raised in this case concerns stormwater management. Petitioner filed a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD), and it was approved by Technical Staff on February 8, 2012. Exhibit 7. The approval states that the site is exempt from preparing a Forest Conservation Plan (FCP) because the project is a modification to an existing developed property and contains no forest or stream valley buffers. Also mentioned is that the subject site is not located within a Special Protection Area. The Technical Staff report notes that this project will require a Preliminary Plan Amendment, at which time the NRI/FSD approval and the FCP exemption will be re-evaluated. Exhibit 20, p. 13.

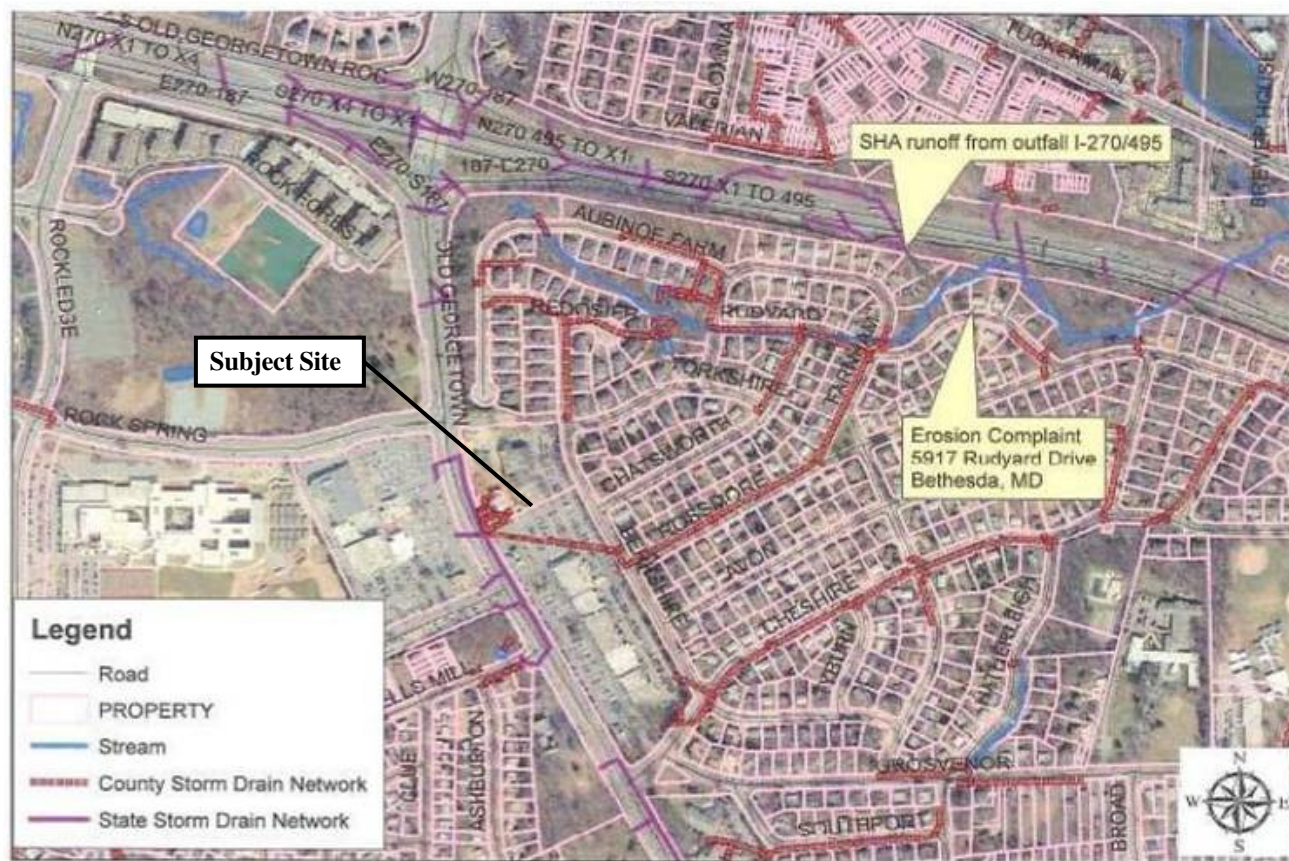
Stormwater management became an issue because of the submissions (Exhibits 27 and 52(a)) and testimony of Joseph Dias, who lives at 5917 Rudyard Drive, in Bethesda, just east of Farnham Drive. Tr. 175-211. Mr. Dias's testimony was supported by Diane Cameron, Conservation Director of the Audubon Naturalist Society (Exhibit 55).

Mr. Dias noted that his home is north and east of, and more importantly, downhill from the proposed productivity housing. He is not in an area that is represented by WMCA, but he is a homeowner directly impacted by decisions on stormwater management facilities for this development site. His written submission explained the background of his problems (Exhibit 27, p. 1):

1. Between 1990 and 1995, Homeowners objected to various proposed Stormwater Concept Plans submitted on behalf of Mr. Aubinoe for 44 new homes to be built north and west of the Wildwood Manor Shopping Center.
2. In objecting, two options, to reduce and possibly reverse downstream erosion, were presented to DPS but deemed "infeasible" by developer's project engineers. Consequently DPS came up with a compromise in late 1995 which included "low impact" stream improvements.

According to Mr. Dias, the net effect of this “expedient solution” in 1995 is “significant stream bed and channel (depth and width) erosion in the past twelve years.” Mr. Dias admits that the Aubinoe residential development north of the subject site is not the sole reason for his problems, “[b]ut it is possibly a key contributor.”

Mr. Dias suggests that development of the subject site is further contributing to the problem (Exhibit 27, p. 2). He states that the area where 44 new homes were built in late 1990s and the 3.5 acre subject site are “encapsulated” by County drains that flow downhill to the stream. Mr. Dias included a map showing his location relative to the subject site:



Overall watershed draining residential and commercial properties from west of Old Georgetown Road and the northwest section of Oldwood Manor development through the storm drain network

Mr. Dias notes that water runoff from the I-270/495 spur is also a source of his problem, and he is still fighting the County and the State Highway Administration (SHA) over the stormwater



management issues; however, he feels it is important to slow down the flow in all cases. Tr. 197-198.

Mr. Dias submitted pictures showing the extent of the problem (Exhibit 27, pp. 3-4):

#### Attachment D



Photo 1: Downstream view of stream  
Between 10505 Farnham and 5921 Rudyard



Photo 2: Upstream view with dry channel on  
right draining 3 Farnham houses and SHA's I-270



Photo 3: Eroding stream bank behind 5921  
Rudyard with shallow rooted bamboo



Photo 4: Exposed tree roots and eroding stream  
bank behind 5917 Rudyard



Photo 5: Undermined tree leaning on fence that is  
recommended for flush cut behind 5917 Rudyard



Photo 6: SHA's fallen, undermined chainlink  
behind 5917 Rudyard

Photos # 1, 2, 3 show significant erosion behind his immediate upstream neighbors. # 4, 5, 6 are from behind his house. #4- note person is over 6ft tall. #5- tree with roots undermined leaning on his fence.



Photo below shows proximity to his house on left and 7ft. from neighbor's slab shed on right.



Photo below shows fence separating two upstream neighbors with backyards (left to right) split into two parts.



Mr. Diaz also noted that in the past Mr. Aubinoe got permission to put a pipe under a road to carry some of that storm water to an outfall. That pipe had built-in velocity dissipaters. He believes that those dissipaters have probably eroded, so water is coming full force from the shopping center and the neighborhood under the road into that outfall. Tr. 194-195.

Mr. Dias feels that the laws are inadequate to prevent stormwater damage, and for Applicant to do just the minimum requirements, doesn't reflect reality. Tr. 191. Mr. Dias's request is to require that all stormwater be retained on the subject site for the entire 3.5 acres under consideration. In his opinion, low impact development (LID) facilities such as green roofs, bio-retention, impervious runoff dispersion and permeable pavements are ways to reduce some water runoff, but they do not of themselves ensure that all stormwater will be retained on site. Mr. Dias relies on Zoning Ordinance §59-G-1.21(a)(9) which requires that the special exception site be served by adequate public facilities services and facilities, including storm drainage. He also notes that §59-G-1.22 authorizes the Board, the Hearing Examiner or the District Council to supplement the specific requirements of the article with any requirements necessary to protect nearby properties and the general neighborhood. Tr. 183-185.

Petitioner's civil engineer, Pearce Wroe, candidly admitted that some of the water runoff from the site does drain towards Mr. Dias's home. He testified there is a storm drain system that cuts across the shopping center, goes down near Chatsworth and Yorkshire, and finds its way over to the outfalls at Rudyard and Farnham. The drainage from the shopping center and the site flow to that outfall. He stated that about 100 to 120 acres of drainage outfalls at this specified storm drain location, and the site connects where it crosses the shopping center. Tr. 287-288. Moreover, the Department of Permitting Services denied Petitioner's request for an administrative waiver of the applicable stormwater management standards. Petitioner then submitted an amended stormwater management concept plan (Exhibit 35(a)), which is pending with DPS.

Mr. Wroe further testified that under the applicable regulations, for a redevelopment project, the standard is to do environmental site design (ESD) to the maximum extent practicable. The County asked Petitioner to look for all reasonable opportunities to do environmental site design practices on the site. Petitioner's engineering analysis determined that a green roof and three micro bio-retention facilities were the maximum extent practicable for stormwater management on site, given the site's limitations with the existing soils which don't infiltrate water very well. Tr. 288-290.

According to Mr. Wroe, the target management rate for the stormwater runoff was around two inches of rainfall. Petitioner would provide for only a little more than one inch of rainfall, not for the entire two inches of rainfall, because there aren't feasible or practical opportunities to discharge all the water. The regulations require Petitioner to explore all reasonable opportunities for environmental site design to the maximum extent practicable or technically feasible. On the redevelopment sites, it gets very difficult and complicated to reach the target threshold because of the existing utilities, the existing storm drain on site and the density of the site. Tr. 189-190.

In Mr. Wroe's opinion, the onsite management will improve stormwater management that exists on this site today by reducing impervious area and providing stormwater retention where there presently is none. He does not see any way in which it would worsen the situation, and it is certainly positive to reduce the flow off of this property. Tr. 288-290.

Petitioner's attorneys argue that what is being requested by Mr. Dias (*i.e.*, that all stormwater runoff be retained on site) would impose conditions on the current proposal above and beyond what the law requires in order to address a problem that is much larger than anything created by this project. Tr. 202-208. Petitioner references stormwater management issues in SDPA 12-1 (SDPA file Exhibit 47(a)) only in the following Design Criterion 1:

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of "green building" technology for the proposed residential building. If any of the major assumptions on which the stormwater management plan approval is predicated change,

due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.

The Technical Staff report is of little assistance with regard to the stormwater management issue because Staff apparently thought that DPS had granted a waiver of applicable ESD regulations. Technical Staff apparently based this erroneous conclusion on a misreading of the dates on the waiver request and DPS approval letter included as Attachment 9 to the Staff report (Exhibit 20). Technical Staff stated, “A stormwater management . . . concept plan has been approved by the Department of Permitting Services (DPS).” Exhibit 20, p. 21. Staff also stated, “. . . A stormwater management concept plan and waivers have been approved by Montgomery County. (See attached letters). ” Exhibit 20, p. 24. In fact, the DPS approval letter is dated May 29, 2008, well before the current project and subsequent changes in the applicable law. Petitioner’s waiver request, dated May 7, 2012, was denied by DPS according to Mr. Wroe’s testimony. As a result, an amended stormwater management concept plan has been submitted by Petitioner.

It is clear to the Hearing Examiner that Mr. Dias raises a legitimate concern, especially since it is conceded by Petitioner’s expert engineer that not all of the runoff from the site will be retained on site, and that some of it will end up in the area of Mr. Dias’s property. On the other hand, Petitioner’s attorneys legitimately question whether this project should be made to rectify the entire problem when it is only a small contributor to it. Also, there is no evidence that the proposed residential building will have more adverse effects on stormwater management than the previously proposed office building.

The Hearing Examiner concludes that, at the very least, this special exception should not make Mr. Dias’s stormwater runoff problem any worse than it already is. The record, at this point, indicates that it will actually improve the situation. There is nothing in the record contradicting Mr. Wroe’s testimony that the onsite facilities will improve stormwater management that exists on this site today by reducing impervious area and providing stormwater retention where there presently is none. He does not see any way in which it would worsen the situation. Tr. 288-290.

Moreover, the stormwater management issue is currently before DPS, and ultimately will be decided by the Planning Board when the amended Preliminary Plan is reviewed by that body. As Mr. Dias correctly points out, stormwater management is a public facilities issue; however, Mr. Dias apparently did not realize that pursuant to Zoning Ordinance §59-G-1.21(a)(9)(A), it is the Planning Board which must determine the adequacy of that public facility in this case, not the Board of Appeals.

Under these circumstances, the Hearing Examiner recommends two special exception conditions which will ensure that the special exception will not make Mr. Dias's stormwater runoff problem any worse than it already is and which will give the Planning Board more flexibility than is currently suggested in SDPA 12-1 Design Criterion 1. The Hearing Examiner recommends the following conditions in Part V of this report:

13. At the very least, Petitioner must take whatever steps are necessary to ensure that this special exception will not result in more stormwater running off the site than currently occurs. In addition, to make it clear that DPS and the Planning Board may elect to impose more stringent stormwater management conditions, Petitioner must amend SDPA 12-1 Design Criterion 1 to read:

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of "green building" technology for the proposed residential building and any other conditions imposed by DPS or the Planning Board. If any of the major assumptions on which the stormwater management plan approval is predicated change, due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval. [Underlining added to note change.]

15. During the preliminary plan amendment process, Petitioner must demonstrate to the satisfaction of the Department of Permitting Services and the Planning Board that stormwater runoff from the entire site will comply with current State and County regulations and will not worsen the stormwater runoff conditions that currently exist downstream from the site.

These conditions would provide some protection to Mr. Dias, while not impinging on the prerogatives of the two agencies (DPS and the Planning Board) charged with evaluating stormwater management issues in cases such as this one. Based on the entire record, the Hearing Examiner finds no environmental concerns warranting denial of this petition.

## F. Community Response

Petitioner's amended proposal to build and operate a multi-family residence on the site in lieu of an additional office building is not opposed by the local civic association – the Wildwood Manor Citizen's Association (WMCA). WMCA withdrew its earlier opposition based on changes Petitioner agreed to in its plans, as described by WMCA's representative, Ann Bryan (Exhibit 31 and Tr. 10-21). Ms. Bryan's testimony will be discussed below.

On the other hand, considerable community opposition remains in this case. The opposition raises concerns about pedestrian safety, traffic congestion, adequacy of parking, school impacts, stormwater management and the placement of the posted notices.

In addition to pre-hearing letters in opposition filed by individual neighbors (*See, e.g.*, Exhibits 21, 27 and 30), six neighbors testified in opposition to the applications at the hearing– Joseph Dias, Melitta Carter, Patricia Broderick, Wendy Calhoun, Andrea Gabossy and Brenda Sandler.<sup>10</sup> Additional comments were filed after the hearing, but while the record was still open. Neighbor Patricia Broderick objected to the placement of the posted notices (Exhibits 47 and 58); neighbors James and Kimberly Balow raised concerns about traffic, parking and stormwater management (Exhibit 49); neighbor Melitta Carter further commented on traffic and pedestrian safety issues (Exhibit 51); neighbor Joseph Dias emphasized his testimony regarding stormwater management (Exhibit 52); Beverly Heller, Vice-President of the Wildwood Estates Homeowners Association, invited commentary from Federal Realty Investment Trust, the owner of the Wildwood Shopping Center (Exhibit 53);<sup>11</sup> and Diane Cameron, Conservation Director of the Audubon Naturalist Society, supported Mr. Dias's testimony (Exhibit 55).

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<sup>10</sup> Two individuals, Nick Attretti and Adrienne Batten, participated in the hearing by cross-examining one of Applicant's witnesses, because they are tenants of the adjacent medical office building and they had concerns about the adequacy of parking. They did not testify, nor express opposition to the project. Tr. 74-79 and 86-89.

<sup>11</sup> The records in the special exception file indicate that Federal Realty Investment Trust, the owners of the Wildwood Shopping Center, was sent notice of the proceedings. Although Ms. Heller suggests that we should hear their views before deciding this case, they apparently elected not to participate in the proceedings, and the Hearing Examiner therefore can reach no conclusions regarding their position.

Each of the concerns raised by the community has been addressed in detail elsewhere in this report,<sup>12</sup> except for the issue raised by neighbor Patricia Broderick regarding the placement of the posted notices. Ms. Broderick contends that the notice signs posted on Old Georgetown Road were not placed in a location calculated to give the community notice of the proposed location of the building because they were located in front of 10401 Old Georgetown Road, instead of in front of the Sandy Spring Bank at 10329 Old Georgetown Road, which is closer to the proposed location of the new building.

The problem with this suggestion is that it would not comport with the statutory requirement of Zoning Ordinance §59-A-4.43(a), which provides, in relevant part:

*(a) Except as provided in section 59-A-4.41(b)(2), within 3 days after the filing of a petition for a special exception or variance, the applicant must erect a sign, furnished by the Board or the Hearing Examiner, on the subject property within 10 feet of the boundary line of each public road which abuts the property. . .<sup>13</sup>*

Ms. Broderick's proposed location would be off of the subject site involved in this case because neither Sandy Spring Bank nor the Exxon gas station is part of the site. Thus, the sign along Old Georgetown Road was properly located on the subject site, consistent with the statutory requirements.

The sign posted along Berkshire Drive was added to the site to satisfy the additional requirement for a special exception of posting a sign on "*each public road which abuts the property.*" Zoning Ordinance §59-A-4.43(a). Though that sign was not timely posted, Hearing Examiner Robeson left the record open for an additional 30 days specifically to allow comments from those alerted by the Berkshire Drive sign. Tr. 298-300. The Hearing Examiner finds that Ms. Robeson's extension of the record remedied the failure to initially post the sign on Berkshire Drive.<sup>14</sup>

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<sup>12</sup> Pedestrian safety in Part II.C.4. regarding Site Access and Circulation, at page 29; traffic congestion in Part II.C.5(a), at page 34; parking sufficiency in Part II.C.5(b), at page 40; school overcrowding in Part II.C.5(c), at page 50; and stormwater management in Part II. E, regarding the Environment, at page 54.

<sup>13</sup> Zoning Ordinance §59-H-4.23 contains similar language for rezoning and SDPA cases, requiring that the sign be posted on the site itself "within approximately 10 feet of whatever boundary line of such land abuts the nearest public road as defined herein."

<sup>14</sup> The Zoning Ordinance does not require a second sign for SDPA 12-1 because the property does not exceed 5 acres. Zoning Ordinance §59-H-4.23(d).



The Hearing Examiner notes the potential visual impact on the new building did not appear to be a chief concern of the community. Although some community witnesses mentioned that the proposed residential building would be larger than the previously proposed office building, both the WMCA and other community witnesses praised the architectural modifications which will significantly reduce the visual impact of the proposed building. Tr. 10-21; 223, 229-230.

Ms. Bryan testified on behalf of the WMCA that many of the protections obtained through the binding elements and design criteria as part of the rezoning to the O-M Zone have been carried over as part of this proposed productivity housing project. Tr. 10-21. These include Binding Element Number 2, specifying that there will be no vehicular access between the proposed property and Berkshire Drive; Binding Element Number 3, specifying that the roof top mechanical equipment on the proposed residential building will be located as far westward on the building as practicable, to reduce visibility from residents to the east, and will be screened in such a manner to reduce visibility and the appearance of height; and Binding Element Number 4, specifying that running the entire length of the proposed property between the eastern most property line, the right-of-way of Berkshire, and the paved area for the vehicular circulation on the subject property, there will be a green space of at least 30 feet wide as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, which currently faces Berkshire Drive and to screen the lower portions of the building. Within this green space, the only land uses will be an approximately 6-foot high, board-on-board fence, shade trees and evergreen plantings on both sides of the fence, selected and located to block this headlight glare.

In addition, Design Criteria Number 3 for the Site Plan specifies that in the unpaved portion of the right-of-way on Berkshire Drive, subject to necessary permits, the following condition will exist – a 4-foot wide concrete sidewalk installed on the Berkshire Drive right-of-way to be extended beyond the southern limits of the property to connect to an existing staircase that provides access to Wildwood Shopping Center. Street trees will be planted on the Berkshire Drive right-of-way between the sidewalk

and street curb, and existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.

Ms. Bryan noted Binding Element Number 5 provides that the building is designed in steps to rise in height as it progresses east to west. There will be a rooftop over the three-story section and a rooftop over the four-story section and planters containing trees will be located on these rooftops. The planters and types of trees, including their six to seven feet height at time of planting, are set forth in the Landscaping Plan which is part of the special exception. The binding element requires that the applicant make this rooftop landscape plan a part of a condition for the grant of the special exception.

In response to Hearing Examiner Robeson's question, Ms. Bryan testified that Petitioner had made all the amendments to the plans consistent with what the community wishes to see. Tr. 17-18. She observed that these changes will mitigate much of the aesthetic impact of Petitioner's proposals.

Specifically, instead of it being a big block building, the proposed structure will be a tiered building, three stories, four stories, and then up, with landscaping including six and seven foot trees planted on these rooftops to improve the appearance. The community has requested and the applicant has agreed, as part of the special exception conditions, to plant the specified evergreen trees at the specified height, to maintain these trees and to replace them when necessary in accordance with the Landscaping Plan made an exhibit as part of the special exception. "With these binding elements, design elements and conditions of the special exception, the Association believes that the impacts of this project will be sufficient[ly] mitigated so the Association would not and does not oppose these applications." Tr. 18.

Ms. Bryan further testified that, as shown in Design Criteria Number 5, the building will not contain the name "Wildwood," which is a community of single-family, detached homes. Tr. 19. Although Ms. Bryan did express some concern about parking and on-site circulation (Tr. 20.), the "bottom line" is that WMCA does not oppose this special exception.

The concerns raised by other members of the community must be evaluated by the Hearing Examiner along parameters established by the Council and enforced by the Department of Permitting Services and the Maryland-National Capital Park and Planning Commission. This special exception (*i.e.* a dwelling in a commercial zone) is permitted by the Zoning Ordinance in this O-M Zone. There is nothing about this proposal which makes the proposed building more intrusive on the surrounding neighborhood than the commercial uses already present or the office building previously approved for the site. In fact, all the expert evidence is that the proposed use will create less, not more, traffic congestion than the previously planned office building. Moreover, with the exception of the unusual stormwater runoff issue, any adverse characteristics the building might have are inherent, rather than non-inherent, and the significance of this distinction will be discussed more fully below and in Part IV.A. of this report.<sup>15</sup>

Land use policy makers (*i.e.*, the Planning Board and the Council) must engage in a kind of balancing act, weighing the right of a property owner to do what it wants to do with its private property against the needs of the neighbors not to have significant adverse impacts upon their properties. The policy makers must simultaneously consider the public interest in having uses such as productivity housing conveniently available in the County. This balancing act is accomplished through the Zoning Ordinance, which sets the parameters within which land uses are permitted. The Council has determined that this type of special exception is permitted, even though it will potentially have some adverse effects on the neighbors regardless of where it is located within the zone. The case law is quite clear that where a use is permitted by the Zoning Ordinance under a special exception, that use may not be denied if the only adverse effects it produces are those which are inherent in the nature of the special exception. As stated in *Schultz. v. Pritts*, 291 Md. 1, 22-23; 432 A.2d 1319, 1331(1981):

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<sup>15</sup> The Hearing Examiner notes that Technical Staff lists “potential parking issues” as a non-inherent adverse effect. Exhibit 20, p. 17. This characterization will be discussed in Part IV.A. of this report.

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects **above and beyond** those inherently associated with such a special exception use irrespective of its location within the zone. [Emphasis added.]

Where there are non-inherent adverse effects, the Board of Appeals may reject an application for a special exception if it determines that the proposal will cause unacceptable harm to the community or will unduly disrupt the harmony of the comprehensive plan of zoning. *Montgomery County, Maryland, v. Melody Butler d/b/a Butler Landscape Design*, 417 Md. 271; 9 A.3d 824 (2010).

Although the opposing neighbors raised some legitimate concerns and made an effective presentation, the Hearing Examiner finds that the preponderance of the evidence does not warrant denial of the special exception based on their concerns. The potentially adverse consequences to the residents are being met by appropriate changes agreed to by Petitioner, including step-backs of the building façade, rooftop landscaping, parking arrangements and a variety of binding elements included in the proposed SDPA. Conditions limiting the impacts on the community are also recommended in Part V of this report. The concerns about stormwater management are more properly addressed at site plan review and at the proceedings to amend the preliminary plan of subdivision. Moreover, the evidence is that the proposed changes to the site will improve the stormwater runoff situation, not make it worse.

The problem with the objections of the neighbors is that the adverse impacts of which they complain (except for the stormwater runoff ) would be expected wherever this use is placed in this zone. Wherever it is located, such a building will likely be visible to some extent; it will produce some traffic; it will create the need for parking; and it will produce some noise and activity. In the subject case, the impact of the activity it may produce is ameliorated by the fact that the building will be adjacent to a shopping center and near to a major road, Md. Route 187. Moreover, some of the potentially adverse effects from the proposed building can be significantly reduced by conditions imposed on the special exception, such as have been described elsewhere in this report.

Thus, the standards established in the Zoning Ordinance to protect the neighbors against adverse impacts from this kind of housing will be met in this case. The decision on a zoning application “is not a plebiscite,” and generalized fears in the community cannot overcome actual evidence. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance.

Technical Staff found that the petition meets the standards required in the Zoning Ordinance (Exhibit 20), and the Planning Board unanimously recommended approval of both S-2830 and SDPA 12-1. Based on this record, the Hearing Examiner finds that the concerns raised by the neighbors have all been satisfactorily addressed.

### **III. SUMMARY OF THE HEARING**

At the beginning of the hearing, Hearing Examiner Lynn Robeson announced that the hearing would be a combined public hearing conducted on behalf of both the Board of Appeals and the County Council to address the applications in both S-2830 and SDPA 12-1. Tr. 4.

Four witnesses were called by Applicant at the hearing – Sassan Gharai, an architect; Victoria Bryant, a land use planner and landscape architect; C. Craig Hedberg, a transportation planner; and Pearce C. Wroe, a civil engineer. Applicant was represented by Jody S. Kline, Esquire and Soo Lee-Cho, Esquire.

The Wildwood Manor Citizen’s Association (WMCA) appeared through counsel, Norman Knopf, Esquire, and through an authorized representative, Ann Bryan, who offered testimony on behalf of WMCA. With modifications agreed to by the Applicant, WMCA does not oppose the applications.

However, six individual neighbors testified in opposition to the applications – Joseph Dias,

Melitta Carter, Patricia Broderick, Wendy Calhoun, Andrea Gabossy and Brenda Sandler.<sup>16</sup>

At the end of the hearing, the record was held open for 30 days, until August 27, 2012, for additional filings and comments by interested parties because the special exception notice sign was put up late on Berkshire Drive. Tr. 297-298.

### **A. Petitioner's Case**

#### 1. Sassan Gharai (Tr. 24-91; 142-143; 259-278; 293-294):

Sassan Gharai testified as an expert in architecture. Using a Surrounding Area map (Exhibit 44), Mr. Gharai described the site and the nearby uses, including the existing bank and medical office building on the site and the nearby gas station, Wildwood Shopping Center and parking lots. There's a Giant supermarket "across the way" (*i.e.*, across Old Georgetown Road). Tr. 27-30.

Mr. Gharai testified that the rationale for the application is that a residential building would have advantages over the previously planned office building. A residential building would mitigate traffic because "it definitely will not create as much traffic as an office building." Tr. 31 It also put to use a parking lot that is essentially empty at night. Finally, the idea of productivity housing has social benefits that go with it. Tr. 30-31.

According to Mr. Gharai, the front of the new building will be very close in height to the existing office building, and it will be stepped down from a five-story building to a four-story building and then a three-story building. On the steps, there will be planters with the six 7-foot high trees. With the setback from the property line, with Berkshire Drive and the vegetation, Mr. Gharai believes it will be very difficult to see the building from the neighborhood to the east. Tr. 33-34.

Using Exhibits 34 and 35, Mr. Gharai explained that by stepping the building down in the direction of Berkshire Drive, only the bottom (*i.e.*, 3-story) level can be seen by a person at the property

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<sup>16</sup> Two individuals, Nick Attretti and Adrienne Batten, participated in the hearing by cross-examining one of Applicant's witnesses because they are tenants of the adjacent medical office building and they had concerns about the adequacy of parking. They did not testify, nor express opposition to the project. Tr. 74-79 and 86-89.

line along Berkshire Drive because the observer will be looking up at a 30 degree angle. Exhibit 36, a rendering of the east façade, shows the trees planted on the third and fourth tiers which will screen those levels from those in the residential neighborhood. Tr. 35-42.

According to Mr. Gharai, crenulations (*i.e.*, irregularities in the façade) are used to reduce the apparent mass of the building. Tr. 43-44.

Using a rendered landscape plan (Exhibit 37), Mr. Gharai described the proposed building. The main entrance of the building is in the center of the lower south bay, which faces the Wildwood Shopping Center and the Balducci's parking lot. There is a sidewalk that goes around the building and connects to the sidewalk of the existing medical office building. The garage entrance is on the rear of the building, there's a loading dock on the north face of the building which is where trash is going to be kept and picked up during the day. There are odor issues with that, noise issues with it, so he tucked it away inside the building, between the two commercial buildings, so that the trash truck could actually pull into the building, pick trash up and remove it with minimal noise and odor. Tr. 47-48.

Mr. Gharai described the vehicular access to the site from Old Georgetown Road and Rock Spring Drive, to the north. There is no vehicular connection between Berkshire Drive and the property, but there is a pedestrian connection. Mr. Gharai agreed with Mr. Kline's suggestion that people were likely to enter the site from the north off of Old Georgetown Road and come south through the site. Tr. 49-52.

Mr. Kline, Petitioner's attorney, noted that in order to not have a disincentive for the office users to park in the structured parking in the building, the Planning Board recommended a condition on the special exception that the upper level garage parking provided for employees, visitors and patients to the medical building next door must be free parking. Tr. 54-55. According to Mr. Gharai's anecdotal testimony, parking is only a big issue near Balducci's on Thanksgiving and Christmas. Tr. 56-58.

The building will have 56 two bedrooms apartments and two one-bedroom apartments. There will be an employee stationed at the front lobby, a business office, a party room, and underground parking. Aubinoe has their own management company so they will probably manage the building with their own staff. Tr. 59-60.

Mr. Gharai testified that, in his opinion, the building design will meet the purpose and standard and regulations of the O-M Zone, accomplishing something that is compatible with the surrounding neighborhood. It will be buffered from the neighborhood sufficiently and will clearly be part of the commercial zone in front of it. It is beginning to look like a mixed use development, and it clearly works. Also, it steps down to the neighborhood. Tr. 61-62. Mr. Gharai further testified that the site circulation, both vehicular and pedestrian, will provide a maximum of safety, efficiency and convenience for people to move around the building and to the surrounding uses. Tr. 62.

[The parties agreed to a condition which would require trash pickup to occur between the hours of 8:00 a.m. and 5:00 p.m., and a condition that the word “Wildwood” will not be used in the title of the building. Tr. 66-67.]

On cross-examination, Mr. Gharai was asked, “What will prevent the folks going to the medical center from parking on Berkshire Drive and walking in?” He replied, “Nothing, it’s just inconvenient.” Tr. 71.

Also on cross-examination, Nick Attretti, a current tenant in the adjacent Wildwood Medical Building, indicated that he was not opposed to the petition, but he had questions about parking availability and construction noise. Mr. Gharai responded that he did not know about construction noise, but he felt that the amount of available parking would be adequate. Tr. 74-79. Similar questions about the shared parking were raised by another tenant of the medical building, Adrienne Batten, who has concerns about patient parking and her own parking. Mr. Gharai responded that parking is not needed



for every tenant because people use other forms of transportation, and the residential parking needs are generally at different times than the medical parking needs. Tr. 86-89.

Mr. Gharai testified that there would be 114 underground parking spaces, with about 60 reserved and paid spaces for residents. The upper floor is unrestricted and free. There will also be shared parking with the other uses above ground. Tr. 81-85.

On redirect, Mr. Gharai testified that the planned residential building would be “a lot more compatible” with the neighborhood than the previously planned office building. Tr. 90-91.

Mr. Gharai was recalled to testify that there will be 47 open parking spaces in the new garage and 67 restricted parking spaces (*i.e.*, restricted to residents). The open spaces will be on the top floor of the garage and will be free. The restricted spaces may optionally be paid spaces. Tr. 142-143.

[Hearing Examiner Robeson asked Mr. Kline if he had any witness who could discuss current traffic conditions in and around the site because the LATR study is five years old and the community testimony was that traffic backups were excessive. Tr. 249-259.]

Mr. Gharai was recalled to address the traffic and site circulation concerns. Mr. Gharai testified that he is at the site about two to three times a day, on average. He indicated that most people in the apartment building are going to leave the site in two main ways. For those going north, or onto I-270, they can exit at Rock Spring Drive, north of the site and for those going south or west or onto I-495, there is a six-lane access road that is just south the gas station that allows traffic to continue straight ahead, through a traffic light, onto Democracy Boulevard, or to turn north or south onto Old Georgetown Road. The occupants of the subject site are not likely to progress through the shopping center to its southern exit onto Cheshire because they have the other larger exit available just south of the proposed building, across from Democracy Boulevard. People can also enter the site by using the access across from Democracy Boulevard. Mr. Gharai noted that the parking to the rear of the shopping center is mostly employee parking, delivery trucks and dumpsters, and most of the people who come to the

center don't actually park there. Tr. 259-278. In his opinion, the access points and site circulation are safe and will operate safely. Tr. 293-294.

2. Victoria Bryant (Tr. 91-140; 171-173; 281-284):

Victoria Bryant testified as an expert in land planning and landscape architecture. She described the area surrounding the site, noting that it was consistent with Technical Staff's definition of the surrounding area. It is bordered by Old Georgetown Road to the west, I-270 to the north, Farnham Road to the east and Cheshire Drive to the south. Tr. 93-94. The 3.5 acre site is between Old Georgetown Road and Berkshire Drive, and the property gradually slopes down from the northwest corner to the southeast corner. There is a significant amount of trees along the northern boundary between the site and the single family homes to the north, and there is a hedge row between the site and Berkshire Drive to the east. The property to the north is in the R-90 TDR Zone, and to the south is the Wildwood shopping center in the C-1 Zone, with a parking lot in the R-90 Zone. They have a special exception to allow for parking associated with their shopping district.

Across Old Georgetown Road there is a C-1 Zone that has a Giant, a Chipotle and a couple other restaurants, and the Walter Johnson High School is behind that. There's an MXPD site that has been partially developed with apartment buildings along Interstate 270, and they have plans in for a mixed use development for the remainder of the site. Tr. 94-95.

Ms. Bryant indicated that there is about a 10-foot difference in elevation between the site of the proposed building and Berkshire Drive. There are trees (a row of hemlocks), which create "a fairly decent evergreen screen" and an existing 6-foot wooden fence separating that street and the site. There is also a fairly extensive sidewalk system allowing pedestrian movement through the site. Petitioner can't control anything that's on the adjacent property. They currently don't have existing islands in their parking lot. It's pretty traditional in a parking lot in a more suburban area that you don't have sidewalks and that people get out of their cars and walk from the car to the entrance of the shopping center that

they're going to. There's approximately a 10-foot planting island that delineates the site from Balducci's property. Balducci's is the tenant in the northernmost bay of the Wildwood Shopping Center, with parking perpendicular to its face on the north. A gas station abuts the property line near the front of the proposed apartment building. There are no windows or anything on the backside of that building, so it acts as its own screen for a good portion of the property line. Tr. 96-101.

According to Ms. Bryant, Petitioner added a new sidewalk that goes all the way from the northern property boundary to the southern property boundary and beyond, down to the first steps over to Balducci's, and there's an opening in the wood fence that pedestrians can go through. The tree stand from Berkshire on the slope and up onto the property itself is a mix of what would be traditional Landscape Plans, with native type material, and exotic invasive weeds because nobody's really been maintaining that edge. There are a fair amount of arborvitaes that are in the 30 to 40 feet in height range. The plan was to save many of those, taking a couple of them out that were in poor health. There is a very thick hedge between the corner of Berkshire Drive and the new 6-foot wood fence. On the other side Petitioner will be proposing additional landscaping. There will be 40% open space. Tr. 101-103.

Ms. Bryant stated that there is a very large green area directly north of the existing medical office building. That portion of the asphalt parking lot has been removed and landscaping has been put in. The part that is going to be north of the parking lot has not been removed yet, and will be part of this application. There will be 30 feet of landscape buffer along the eastern property line that abuts Berkshire Drive. Tr. 104.

On the southern edge of the proposed apartment building, there will be a notch out in the building and there's a large green space associated with that. There will also be some additional green space around the existing office building. Tr. 105.

The 1992 Master Plan gives no specific guidance regarding this location. It does give general guidance in that there needs to be a variety of affordable housing, and developing of mixed use areas,

which create a more transit friendly development is important for the whole of the Master Plan. The O-M Zone is intended for moderate intensity development, but dwellings are an allowed use under a special exception. Ms. Bryant found that this area is not a predominantly single-family community. This is a mixed-use community within the defined neighborhood. There are single families to the north and to the east, and commercial uses in the defined neighborhood. In her opinion, an apartment building would not change the character of the neighborhood, because the character of the neighborhood is a mixed used neighborhood. Moreover, the apartment building, although it will be a larger building, it will be a lower intensity use than the office building would have been. It will generate less traffic and activity since a residential building disseminates that activity over a broader period of time than you would get with an office buildings. Tr. 105-108.

Ms. Bryant further testified that the Development Plan Amendment is substantially in accordance with the Master Plan, and the proposed development would comply with the purposes standards and regulations of the zone. She finds that it will be a moderate intensity use and a moderately sized building. Tr. 108

Ms. Bryant described the vehicular and pedestrian circulation on the site. Tr. 108-112. She noted that the parking lots in general are not easy to navigate, but there are many stores available to the residents, and they should not have to get into their cars to do every single trip that they need to do on a general day. Tr. 113. According to Ms. Bryant, the project will satisfy all the dimensional requirements of the O-M Zone, and in some cases, Petitioner has agreed to binding elements that are even more stringent than the requirements of the zone itself. For example, Binding Element No. 6 limits the building to five stories or 50 feet in height. Binding Element Number 8 has limitations on the easternmost and the southernmost setbacks to 16 feet, less than what the zone would allow. With those limitations and with the building design, Ms. Bryant opined that both the use and the design are compatible with the setting where it's located. "[It] is a great transitional use between the single

family and the commercial that exists there today.” She noted that the building will be 50 feet at the front, but it will be only 37 feet along the average grade at the back. That is only two feet higher than the 35 foot height allowed under the R-90 Zone for a single-family home. Thus, the massing on the back side has been minimized. Tr. 114-116.

In Ms. Bryant’s opinion, the parking associated with a multifamily building is an inherent potentially adverse effect. Sharing access with the shopping center and the impacts from that would be non-inherent; however, this is a typical shared-parking situation, where the uses have different peak hours. She feels that the parking Petitioner will be providing will be adequate to service the proposed use, plus the uses that are already there. Petitioner will be providing even more parking than what’s required under the shared use parking calculations. Tr. 116-119.

Ms. Bryant described the proposed landscaping, and indicated that it will provide screening, in addition to adding color and texture, making it an attractive landscaping, not just a row of arborvitaes. She could not recall if parking lot shading is required in this situation. Tr. 119-123.

Ms. Bryant introduced Exhibit 39, an aerial view of the footprint of the building. The left side depicts the front of the building that faces Old Georgetown Road, and the right hand side is the back of the building that faces Berkshire Drive. The building will have steps in it, and on the right hand side of the exhibit, there are two distinct areas that have a crosshatch on them, with little squares of green. Those are actually terraces that are on top of the roof of the third floor building and the fourth story part of the building. Each of these terraces will have a series of trees that will be pushed out towards the edge of the terrace, with 6 to 7 foot high evergreen trees in pots, and then the interior spaces will be patios for the units. Exhibit 36 gives a good representation of the trees at the time of planting. She feels it will be “very lovely for both the residents and the adjacent property owners.” Tr. 125-128.

In Ms. Bryant’s professional opinion both on the landscaping issue and the land planning

issue, the building and use will be in harmony with the general character of the surrounding neighborhood. There is nothing that would be detrimental to the use of the surrounding land area. All the utilities will be placed towards the front of the building and they will be soundproof, so there should be no noise associated with that. The trash pickup will be at time where most people will be at work, so there will be no noise or negative impact. The building will not change the character of the surrounding area, which is a mixed used community, and it fits in the mixed used. Nothing would have an adverse effect on the health, safety, welfare or morals of the surrounding area. Tr. 128-130.

With regard to the Schematic Development Plan, Ms. Bryant opined that the proposal will result in an internally compatible development with no adverse effect on the surrounding community. Tr. 130.

On cross-examination, Ms. Bryant stated that the trees are a part of the binding elements, so they would have to be replaced, and typically they could be replaced within a month of when they're deemed to be dead, depending on the right time of the year to be planting. [Mr. Kline noted that it will be a condition to the special exception.] Tr. 131-132.

Ms. Bryant discussed considerations in defining the neighborhood, which include natural and man-made barriers and the areas most likely to be impacted by the special exception. She noted that while there are no other multifamily buildings, there are other uses. There is a bank, a gas station, a copying center, single-family homes – a multiple of uses there, and traditionally a multifamily is a good transitional use between commercial and single-family residential. It is compatible. Tr. 132-135.

Ms. Bryant also testified that Petitioner would add 16 proposed trees to the Berkshire side of the fence to make the neighborhood side more aesthetically pleasing. The fence is 10 feet into Petitioner's property. [Mr. Kline indicated Petitioner would maintain the area.] Tr. 136-140.

Ms. Bryant testified that she did not independently verify the school population figures or pupil generation from this project. However, she noted that the Staff Report says that there will be eight students generated by this proposal, three elementary, three middle and two high school students. The schools are over capacity, but Petitioner will be making a school facilities fee payment, and the schools will accept the students. Tr. 171-173.

Ms. Bryant was recalled to the stand on the question of parking space calculations. She testified that originally Petitioner calculated parking spaces for each productivity housing unit at a set rate (.75 spaces per unit). Petitioner revised that to calculate parking spaces based on the number of bedrooms per unit. A one bedroom dwelling unit would call for 1.25 parking spaces, while a two bedroom unit would call for 1.5 parking spaces per dwelling unit. Using those numbers, two one bedrooms units at 1.25, rounds up to 3 spaces and 56 two bedrooms units at 1.5 yields 84 spaces, which is a total of 87 parking spaces required for the residential component. Then the non-residential uses on site which was the existing medical office, which is five per thousand square feet, at 30,000 square feet, turns out to be 150 parking spaces. The existing bank, which is 2.7 per thousand square feet, at 3,700 square feet, requires 10 spaces. That gives a total of 247 parking spaces for all of the uses on site. The County allows in a mixed used development to allow you to do shared parking calculation, and that calculation varies with the type of use and the time of day. The medical office from the 6:00 a.m. to 10:00 p.m. weekdays, would have a 100 percent requirement and the bank office would have 100 percent, but the apartments would have a 50 percent parking requirement during that period. Using this method, the maximum required would be 204 spaces on weekdays, from 6:00 a.m. to 6:00 p.m. Petitioner will actually be providing 225 parking spaces, which is 21 higher than what the shared parking calculations require. Tr. 281-283.

According to Ms. Bryant, shading is not required within the parking lot because this is not in a one-family residential zone. Tr. 284.



3. C. Craig Hedberg (Tr. 144-160; 285):

C. Craig Hedberg testified as an expert in transportation planning. He was involved in the traffic study for the initial rezoning study. That study included a two phase development. Phase 1 was the bank which has been constructed, and phase 2 was to be the 30,000 square foot office building, which the subject application is intending to modify.<sup>17</sup> No intersection improvements were required for the bank building because all intersections met the congestion standard, which is a Critical Lane Volume (CLV) of 1550 for this area.

Mr. Hedberg further testified that the then-proposed office building would have generated a sufficient number of trips that an improvement was required at the intersection of Old Georgetown Road and Rock Spring Drive, which aligned with the entrance to the subject site. When the first stage moved ahead, the State required that the Phase 2 improvement be acted on along with the bank approval. As a result, that improvement was installed ahead of schedule, and it increased the attractiveness and accessibility of the site opposite a signalized intersection onto Old Georgetown Road.

The previous proposal, the 30,000 square foot office, would have generated 63 peak-hour trips. In the current modification, with the 58 apartment units, the trip generation drops to about 28 peak-hour trips, much lower than what was reflected in the original traffic study. With that drop in peak hour trips, no further traffic study was required since the property already had an approval for a higher ceiling. Tr. 145-147.

In response to Hearing Examiner Robeson's question, Mr. Hedberg discussed the intersection of Cheshire Drive and Old Georgetown Road, which was not a part of the original traffic study scope specified by Technical Staff; however, Technical Staff examined it in 2008 and found that the intersection operated well within the congestion standard. He noted that there's a very short stacking distance between that intersection of Grosvenor coming into Cheshire and Old Georgetown Road. The

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<sup>17</sup> The medical office building already existed on the site pursuant to a special exception granted in the 1960s.

stop signs and operational configuration cause the traffic congestion. “If you start with a clean slate, you know, we wouldn’t lay out intersections so close, but that’s the way the area has developed over time.” Tr. 147-150.

Mr. Hedberg further testified about the primary vehicular circulation that is anticipated for visitors and residents of this project. He stated that he focused on the access from Old Georgetown Road, which is a major highway intersecting with other major highways, Democracy Boulevard, Rock Spring Drive, and the I-270 spur interchanges. The access is focused on that roadway because it’s the major travel route. The shopping center has speed bumps, stop signs, crosswalks and pedestrians, which makes entry from the south very circuitous, a lot of local internal friction. Thus, while it is possible for people to access the site from the south and weave through the shopping center, in his professional judgment, it is much better to access the site via Old Georgetown Road. There’s no access from Berkshire Drive. Tr. 150-152.

When asked by Hearing Examiner Robeson why there needs to be an access to the site from the south if nobody is going to use it, Mr. Hedberg stated that he didn’t want to discourage internal trips to access retail (or other convenient uses) or force traffic out on the highway for these very short trips. Tr. 153-156. Mr. Hedberg also described bus routes in the area. Tr. 156-157.

Mr. Hedberg further testified that the PAMR requirement is a trip mitigation type of measure. There are percentages of trips generated that vary by policy area in terms of what the PAMR payment obligation is. Originally, the site with the office had a PAMR requirement of 25 trips. Now, with the proposed apartment building, the PAMR requirement is down to 14 trips, at \$11,000 a trip. So there would be a PAMR obligation of about \$154,000. Currently, the PAMR requirement is only 25 percent as opposed to 40 percent, but because of the initial application time, Petitioner is committed to the higher percentage for PAMR requirement. Tr. 157-158.

Mr. Hedberg stated that in his professional opinion, this project will be served adequately by existing facilities and the transportation network since there is very good access to major roadways, arterials, all the way up to freeways and Petitioner has provided local access improvements to add capacity at the principal access point right opposite Rock Spring Drive. He also opined that the internal circulation is safe and adequate. Tr. 158.

On cross-examination, Mr. Hedberg was unable to answer a question as to the number of people who live in the neighborhood that currently take the bus or walk to the metro, instead of drive. He also did not know what percentage of the people in the 58 apartments would be expected to take the bus or walk the 1.8 miles to the metro instead of drive, but felt that figure would be representative of what currently exists in the community. Tr. 159-160.

Mr. Hedberg was recalled to explain how the intersection of Democracy and Old Georgetown Road got to be designated as the most congested intersection in Montgomery County and how that was corrected at the Planning Board. According to Mr. Hedberg, that designation was the result of a calculation error due to a misplacement of numbers in the data sheet. Apparently, the Old Georgetown Road volumes were repeated for the Democracy Boulevard volumes, which completely threw off the calculation. Technical Staff checked this issue just before the hearing with the person that compiled that report and did a recalculation with the correct numbers. The recalculation, as indicated in the Planning Board minutes, revealed that the intersection operates well within the critical lane volume standard. Tr. 285.

4. Pearce C. Wroe (Tr. 161-170; 188-190; 287-293):

Pearce C. Wroe testified as an expert in civil engineering. He introduced Petitioner's revised stormwater management concept plan (Exhibit 42), which, he testified, adheres to the County laws to provide environmental site design to the maximum extent practicable. It involves small scale practices distributed throughout the site, inasmuch as is feasible, in order to provide stormwater management. He

noted that there's been a change in the law in recent years that requires Petitioner to update the plan from what was previously approved.

In this particular case, the concept involves having green roof for this building and now a series of small landscape features, micro bio-retention facilities, that provide retention and filtration on site. The green roof is designed to be about eight inches in depth and then cover about 75 percent of the building footprint area, which is typical for essentially covering as much building as possible, while allowing for mechanical equipment and any other amenities that may occur on the roof for other utilities.

According to Mr. Wroe, Petitioner has maxed out how much green roof can be provided on the building. On the east side of the property, on Berkshire Drive, Petitioner will add a little more landscape buffer than what's currently existing. Petitioner will fill those areas in with a rain guard, a small depression that filters water through a planting media and then to an under-drain system where it goes on to the downstream storm drain system. There will be three of those facilities, two located near Berkshire Drive on the site side with the 6-foot fence and then one next to the new building to treat any water the green roof does not provide treatment for from the building. Ultimately, all that runoff connects into the existing storm drain system on the adjacent property. Tr. 164-165.

Mr. Wroe further testified that by consolidating some of the infrastructure parking and going more vertical with the building, the impervious areas will be reduced. That combined with having the small scale facilities and the green roof all serve to start reducing the runoff from the site as compared to existing conditions which do not have any stormwater management currently serving the property. It was constructed before there were stormwater ordinances that required the onsite management. Tr. 166.

In response to Hearing Examiner Robeson's question as to whether there were any quality or quantity controls, Mr. Wroe replied (Tr. 166-167):

No, there is one facility in conjunction with the bank building under the previous concepts, this was constructed. There is an underground filtering system, it doesn't retain water, but it filters water just for quality and that's discharged in the same storm drain. The previous concept had that similar facility for the office building, and the

same parking improvements. But as we were asked to change the new law for the County, we've updated that to do more management volume retention also.

He added that the approved storm water concept with the office building proposal called for filtration but no volume retention. Petitioner was asked to update those plans and they were submitted in June and are currently under review, pending approval. In his opinion, "it's an approvable concept . . ." Tr. 167. He expects comments from the County to be about the actual facilities themselves and not large scale changes about where the building is, how big it is, what the parking lot layout is or any other global changes. In his experience, dealing with similar redevelopment cases, and similar stormwater management designs, they haven't asked for a change of a building or a parking layout, especially for redevelopment projects. Tr. 167-168.

Mr. Wroe further testified that the trees on the step up will not be bio-retention facilities; they're just potted, but they would potentially count as green roof because they're exceeding eight inches in depth on the planting media. Tr. 167-168.

As to the adequacy of other public facilities that will be serving the proposed development, Mr. Wroe stated that the property is located in a sewer-water category of S1 and W1, which essentially means that it's adequately served by both of those utilities. Fire, rescue and police services are operating in accordance with the current subdivision staging policy resolution. Petitioner also has an emergency access plan approved for the previous office building development showing that it can be served by those emergency vehicles. Because of the access through the frontage of this building won't change substantially with the residential design, Mr. Wroe does not believe there will be any conflicts with the emergency access plan as the new plan is laid out. Gas, electric, and communications are all readily available at the site already as well. Tr. 168-169.

In Mr. Wroe's professional opinion, from an engineering perspective, he proposed development would not be detrimental in any way to the use or enjoyment of the surrounding area properties, nor will

the proposed use adversely affect the health, safety, security and welfare of residents, visitors or workers in the area. Tr. 169-170.

Hearing Examiner Robeson asked Mr. Wroe whether his stormwater management concept plan fully mitigated the stormwater quantity and quality. Mr. Wroe replied that it did not. He explained that an administrative waiver request for the old plan was denied. After that, Petitioner submitted a new plan. He stated that Petitioner exceeds the minimum thresholds under the new regulations “and they fall short of what the target area would be for the development, the limits of disturbance . . .” Tr. 188.

The limits of disturbance include everything that’s going to be constructed or altered, including the new building and the parking around it.

According to Mr. Wroe, the target management rate for the stormwater runoff was around two inches of rainfall. Petitioner would provide for only a little more than one inch of rainfall, not for the entire two inches of rainfall because there aren’t feasible or practical opportunities to discharge all the water. The regulations require Petitioner to explore all reasonable opportunities for environmental site design to the maximum extent practicable or technically feasible. On the redevelopment sites, it gets very difficult and complicated to reach the target threshold because of the existing utilities, the existing storm drain on site and the density of the site. Tr. 189-190.

Mr. Wroe was recalled to clarify the location of drainage from the site and to address the question of whether Petitioner would be meeting the current stormwater management standards. He testified there is a storm drain system that cuts across the shopping center, goes down near Chatsworth and Yorkshire, and finds its way over to the outfalls at Rudyard and Farnham. The drainage from the shopping Center and the site flow to that outfall. He stated that about 100 to 120 acres of drainage outfalls at this specified storm drain location, and the site connects where it crosses the shopping center. Tr. 287-288.

Mr. Wroe further testified that the County denied a waiver and asked Petitioner to update its stormwater management concept plan to the new regulations. Petitioner therefore submitted a revised concept to comply with the new regulations. For a redevelopment project, the standard is to do environmental site design to the maximum extent practicable. The County asked Petitioner to look for all reasonable opportunities to do environmental site design practices on the site. Petitioner's engineering analysis determined that a green roof and three micro bio-retention facilities were the maximum extent practicable for storm water management on site, given the site's limitations with the existing soils which don't infiltrate water very well. It was necessary to tie into the existing shallow storm drain system off site, but Petitioner has no control over its depth. Those are probably the two main limiting factors that say how much water is stored off site. This concept ends up treating a little more than an inch of rainfall for the subject development, and that translates into about 90 percent of the average annual rainfall in the area, which are mostly small volumes of water. In Mr. Wroe's opinion, the onsite management will improve stormwater management that exists on this site today by reducing impervious area and providing storm water retention where there presently is none. He does not see any way in which it would worsen the situation, and it's certainly positive to reduce the flow off of this property. Tr. 288-290.

### **B. Community Participants**

#### **1. Ann Bryan, individually and on behalf of the Wildwood Manor Citizen's Association (Tr. 10-21):**

Ann Bryan testified individually and as the official representative of the Wildwood Manor Citizen's Association (WMCA). She also submitted her testimony in written form (Exhibit 31). Ms. Bryan stated that the Association is located downhill and to the east of the proposed productivity housing building, on the opposite side of Berkshire Drive. The Association consists of approximately 520 single-family, detached homes, and the proposed productivity housing building will be seen from numerous residences in the community.



Ms. Bryan reviewed the history of the rezoning case, and noted that WMCA worked with the applicant and ultimately did not oppose the O-M rezoning and the proposed office building. She testified that many of the protections obtained through the binding elements and design criteria as part of the rezoning to the O-M Zone have been carried over as part of this proposed productivity housing project. These include Binding Element Number 2, there will be no vehicular access between the proposed property and Berkshire Drive; Binding Element Number 3, the roof top mechanical equipment on the proposed residential building will be located as far westward on the building as practicable, to reduce visibility from residents to the east, and will be screened in such a manner to reduce visibility and the appearance of height; and Binding Element Number 4, running the entire length of the proposed property between the eastern most property line, the right-of-way of Berkshire, and the paved area for the vehicular circulation on the subject property, there will be a green space of at least 30 feet wide as a buffer to screen the parking area including the blocking of headlights of cars exiting the garage, which currently faces Berkshire Drive and to screen the lower portions of the building. Within this green space, the only land uses will be an approximately 6-foot high board-on-board fence, shade trees and evergreen plantings on both sides of the fence, selected and located to block this headlight glare.

In addition, Design Criteria for Site Plan Number 3, in the unpaved portion of the right-of-way on Berkshire Drive, subject to necessary permits, the following condition will exist. A 4-foot wide concrete sidewalk installed on the Berkshire Drive right-of-way to be extended beyond the southern limits of the property to connect to an existing staircase that provides access to Wildwood Shopping Center. Street trees will be planted on the Berkshire Drive right-of-way between the sidewalk and street curb, and existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.

Ms. Bryan further testified that the productivity housing proposal changed greatly key provisions of the original binding elements. For example, the original proposed office building had an F-A-R of

0.46, while the proposed productivity housing building has an F-A-R of 1.3. The proposed office building was about 30,000 square feet and the productivity housing building will be about 80,000 square feet. The original proposed office building was three stories, 42 feet in height, as measured from the average elevation. A finished ground surface along the front was not to exceed four feet above the existing building. Along the east side, the building couldn't exceed 56 feet. The productivity housing building will be 50 feet in height in terms of average elevation, the height permitted by the O-M Zone. The original proposed office building was to be no closer than 130 feet from the eastern property line along Berkshire Drive, while the productivity housing building will be much closer, and under the present proposal it's only 63 feet from the Berkshire Drive property line.

Ms. Bryan observed that these changes will create a much more visible building, having an intrusive aesthetic impact on the community. Negotiations with the applicant resulted in some changes, which have been made binding elements and which the community feels will mitigate much of this aesthetic impact.

Specifically, Binding Element Number 5 provides that the building is designed in steps to rise in height as it progresses east to west. There will be a rooftop over the three-story section and a rooftop over the four-story section and planters containing trees will be located on these rooftops. The planters and types of trees, including their six to seven feet height at time of planting, are set forth in the Landscaping Plan which is part of the special exception. The binding element requires that the applicant make this rooftop landscape plan a part of a condition for the grant of the special exception.

In response to Hearing Examiner Robeson's question, Ms. Bryan testified that Petitioner had made all the amendments to the plans consistent with what the community wishes to see. Tr. 17-18. Ms. Bryan summarized that the result, instead of it being a big block building, will be a tiered building, three stories, four stories, and then up, with landscaping including six and seven foot trees planted on these rooftops to improve the appearance. The community has requested and the applicant has agreed, as

part of the special exception conditions, to plant the specified evergreen trees at the specified height, to maintain these trees and to replace them when necessary in accordance with the Landscaping Plan made an exhibit as part of the special exception. “With these binding elements, design elements and conditions of the special exception, the Association believes that the impacts of this project will be sufficient[ly] mitigated so the Association would not and does not oppose these applications.” Tr. 18.

Ms. Bryan further testified that, as shown in Design Criteria Number 5, the building will not contain the name “Wildwood,” which is a community of single-family, detached homes. Tr. 19.

Finally, the Association is concerned about the impact that this project will have on parking along Berkshire Drive, if the expert’s conclusion that there is adequate parking onsite should prove erroneous. Berkshire Drive is a main Wildwood community thoroughfare. It is a rare occurrence to find a car parked on Berkshire Drive behind the shopping center as the street is too narrow for parking lanes and two lanes of cars passing each other. She feels that if cars park on Berkshire, it will be dangerous to drivers and pedestrians. Therefore, if this should occur, the Association will request Montgomery County to post no-parking or permit-parking signs on sections of Chatsworth and Berkshire and any other street that would become impacted behind the shopping center and the proposed productivity housing building. Tr. 19.

Ms. Bryan noted that there are three entrances to the shopping center from Berkshire, and that there is very heavy pedestrian traffic, especially school traffic, “kids coming from Walter Johnson, and if this becomes a parking lot, it will be a problem for [the] community.” Tr. 20.

2. Joseph Dias (Tr. 175-211):

Joseph Dias testified that he lives at 5917 Rudyard Drive, in Bethesda, which is just east of Farnham Drive. Mr. Dias also submitted his testimony in written form (Exhibits 27 and 52(a)). His concerns are with stormwater management. Tr. 175-176.

Mr. Dias noted that his home is north and east of, and more importantly, downhill from the proposed productivity housing. He is not in an area that is represented by WMCA, but he is a homeowner directly impacted by decisions on stormwater management facilities for this development site. [Mr. Dias summarized the written testimony he submitted. Since that is already in the record, it will not be repeated at length here.] Mr. Dias admits that the new development on the site is not the sole reason for the significant streambed and channel erosion in the past 12 years, but he feels that it is possibly a key contributor. Earlier development around the site, including approval of 44 new homes, apparently took place when stormwater controls did not exist due to the lack of an ordinance at the time of development. DPS came up with a compromise in 1995, which included low impact stream improvements. This compromise did not solve the problem, and his property receives a great deal of stormwater runoff and erosion. Tr. 177-182 .

Mr. Dias's request is to require all stormwater be retained on site for the entire 3.5 acres under consideration. In his opinion, low impact development (LID) facilities such as green roofs, bio-retention, impervious runoff dispersion and permeable pavements are ways to reduce some water runoff, but they do not of themselves ensure that all stormwater will be retained on site. Mr. Dias relies on Zoning Ordinance §59-G-1.21(a)(9) which requires that the special exception site be served by adequate public facilities services and facilities, including storm drainage. He also notes that §59-G-1.22 authorizes the Board, the Hearing Examiner or the District Council to supplement the specific requirements of the article with any requirements necessary to protect nearby properties and the general neighborhood. Tr. 183-185.

Mr. Dias further testified that DPS had denied Applicant's request for an administrative waiver of the current stormwater management controls because the preliminary plan and the site plan will be amended. Thus, the project should be planned and constructed in compliance with current requirements instead of being grandfathered. Tr. 186.

Mr. Dias feels that the laws are inadequate to prevent stormwater damage, and for Applicant to just the minimum requirements, doesn't reflect reality. Tr. 191. Mr. Diaz also noted that in the past Mr. Aubinoe got a permission to put a pipe under a road to carry some of that stormwater to an outfall. That pipe had built-in velocity dissipaters. He believes that those dissipaters have probably eroded, so water is coming full force from the shopping center and the neighborhood under the road into that outfall. Tr. 194-195.

Mr. Dias indicated that he is still fighting the County and SHA over the stormwater management issues, but it is important to slow down the flow in all cases. Tr. 197-198.

On cross-examination, the question was raised by Mr. Kline (but not fully answered) as to whether Mr. Aubinoe was involved in the stormwater management issues regarding the 44 homes to the north of the subject site. {Mr. Kline indicated that Mr. Aubinoe was the contract seller of the land on which the homes were constructed, but not the developer. He also argued that "the County ought to be the person that's solving [Mr. Dias's] problem, not a property developer."} Tr. 199-202.

Mr. Dias explained that in August of 1995, he hired an engineer and asked DPS to inform him of any changes in the stormwater management concept plan. The County approved the plan without letting his community know. After the community protested, DPS took the approval back and looked at the engineer's report. The State Highway Administration (SHA) was also involved because some of the flow is coming from the I-270 spur. The consensus was that the majority of the damage was coming not from I-270, but from the outfall mentioned above. According to Mr. Dias, the principal point of the problem is the easternmost intersection of Farnham and Rudyard, on the land that was owned by Mr. Aubinoe and that he dedicated to public use for that particular purpose. [Ms. Lee-Cho argued that what is being requested by Mr. Dias is that conditions be imposed on the current proposal above and beyond what the law requires in order to address a problem that is much larger.] Tr. 202-208.

Mr. Dias completed his testimony by noting that the distance from his house to the shopping center is three-tenths of a mile. Tr. 209-210.

[Mr. Knopf left the hearing after Mr. Dias completed his testimony.]

3. Melitta Carter (Tr. 211-224):

Melitta Carter testified that she has lived on Avon Drive since 1995, and in the neighborhood since 1993. She walks this area every single day, including sometimes at night, and knows it extremely well. Ms. Carter's main issue is with vehicular traffic that will be generated. Tr. 211-212.

Although she understands there will be less traffic for a residential area than there would have been from the previously approved office building, Ms. Carter feels that the office building would have given the neighborhood some benefit, while a residential building doesn't yield any benefits. There will also be a difference in the timing of vehicular traffic. According to Ms. Carter, if it's an office building, traffic would predominately be between 9:00 a.m. and 5:00 p.m. With a residential building, assuming that most people will be going to work, people may be leaving from 6 o'clock onwards. She has one high school student who goes to Walter Johnson on foot every morning and back again. Although there is a bus for middle school or elementary, there is not one for high school. She testified that between 7:00 a.m. and 7:30 a.m., many students "half asleep" walk across the parking lot behind the shopping center. They come in from Cheshire Drive, Avon Drive, Rossmore Drive, Yorkshire, Chatsworth and further along, as well as Aubinoe Farm – a progression coming east to west for about a half hour between 7:00 a.m. and 7:30 a.m., her kids included, heading to Walter Johnson. Although there are three traffic lights at which they can cross, they don't always make the best decisions as to where to cross, and the traffic makes it dangerous, especially when it is still dark in the winter mornings. According to Ms. Carter, the Cheshire Drive intersection with Old Georgetown Road is the busiest because everybody is coming up from Grosvenor Lane and from the whole residential area. She believes there will be a direct conflict of cars coming from the site and high school students who are half asleep, walking in the

opposite direction, the drivers north-south and the pedestrian east-west. There are pedestrian crosswalks on the west side of the shopping center, but there are no pedestrian crosswalks on the east side of it (*i.e.*, behind the shopping center). There are speed bumps there, but people zigzag around them. There are no official County speed signs there, either. Tr. 212-217.

Ms. Carter also believes that the estimates that were given before at the Planning Board for the number of people and the number of cars, which will be in this residential site, are underestimates. Productivity housing may produce different traffic levels. She feels there will be more people and possibly more kids in productivity housing. Busses are infrequent and the Grosvenor Metro is a 30 minute walk away. Ms. Carter believes there will be more cars between 7:00 a.m. and 7:30 a.m. Tr. 218-219.

Ms. Carter noted that the four way stop at Cheshire Drive and the Wildwood Shopping Center southern access is failing (Tr. 220):

. . . This is a horrible corner between about 7:45 a.m. and 9:30 a.m. in the morning, and you have multiple road rage incidents there. You have people coming from Grosvenor who do not wait their turn to stop because they want to get through to that traffic light before it goes red again. You just add another 10 cars, just 10 cars into there, and there are going to be other incidents. So my request is that there is no vehicular traffic access into Wildwood Shopping Center from the site. And this can include cutting off the bank and the medical building, ensuring that all traffic has to enter via Rock Spring. Pedestrian access is different, it can be pedestrian access. But I think if you restrict the access to Rock Spring, you're going to avoid potential high school student car conflict. You're going to avoid generating more traffic at that four way stop and at Cheshire Drive. And you will also, I think, decrease certain parking, potential parking issues.

Ms. Carter also feels that the parking issues around Balducci's will be exacerbated by taking away that 90 parking spaces to construct the building. She recognizes that the spaces belong to Mr. Aubinoe and Co. and that an office building would have brought more traffic, but she believes that the proposed residential building will have a significant impact. Although the architectural designs have gone a great way to reduce the visible impact, it will be a much bigger building than was originally



foreseen. She wishes to make the building a little bit smaller and stop people coming out on the Cheshire Drive access. Tr. 221-224.

4. Patricia Broderick (Tr. 224-228):

Patricia Broderick testifies that she lives at 5930 Rossmore Drive. She noted that the zoning permission sign was not posted on Berkshire Drive, where people in Wildwood could see it and it was not in the shopping center where people visiting the shopping center could see it. “It was way out on Old Georgetown Road in, in front of the planned development, but it was not where most people could see it.” Tr. 224.

Ms. Broderick also stated that the intersection of Democracy Boulevard and Old Georgetown Road is one of the most congested intersections in the County, and the intersection of Old Georgetown Road and Cheshire is a bad intersection. Tr. 225. She added (Tr. 226):

. . . if I walk up from living in Wildwood if I want to walk across to the Giant, like you want to take your life in your hands, but possibly that’s what you want to do, it’s like a raceway people coming home from work, it’s really, it’s awful there. They come through Democracy and Old Georgetown and whosh (phonetic sp.), up there and I can sympathize with this lady talking about the kids trying to get back and forth, you know, and, and both exits on this site are really bad already and I can’t see the point of putting apartments there. I think that, that Aubinoe ought to stay with what it’s zone for now . . .

Ms. Broderick further testified (Tr. 227):

I think if you have office moderate it would be like we have in the medical center now and that’s not making that much more traffic there. Besides . . . something about the friendliness of apartment development, you won’t get the neighborhood feel that you do from single family residences that has made Wildwood a good place to live . . .

Ms. Broderick concluded that the Zone should be left as Office-Moderate. Tr. 228

5. Wendy Calhoun (Tr. 229-233):

Wendy Calhoun testified that she lives at 9806 Ashburton Lane in Bethesda and is the President of the Ashburton Elementary School PTA. She understands that Ashburton Lane is not part of the neighborhood, as defined earlier; however, all the elementary school aged kids in the proposed apartment

building will be going to Ashburton Elementary; the middle school children will go to North Bethesda; and the high school children will go to Walter Johnson. So she considers the site to be part of her neighborhood. Tr. 228-229.

Ms. Calhoun does not understand how one after another of the experts can come in and testify that the proposed building will be compatible with the neighborhood, when those who live there completely disagree. She feels that the renderings are much better this time around than when she saw them initially, and the landscaping now looks very nice; however, she is opposed to it not because of how it looks, but because she believes it will add 200 people to this community. She calculates that there will be 188 people, but only 135 parking spots. Ms. Calhoun sees that as a problem. Even though there are two separate lots as far as Parks and Planning are concerned, they are utilized as one space by the community and anyone who comes there, because there is not enough parking for the shopping center during most hours of the day. In her opinion, the site is over-utilized. "The traffic, especially at that Cheshire Drive is a nightmare and that's where I go in and out all the time." Tr. 229-230.

Ms. Calhoun is also very concerned about existing and projected overcrowding in the schools. While the Petitioner can pay a fine to get around it, that doesn't solve the problem of where these kids go and it doesn't pay for more teachers and more classrooms. Tr. 231-232.

Ms. Calhoun also challenged the expert's estimates of the number of trips that would be generated by the new building. She ask the Hearing Examiner to "look at the bigger picture because all these issues are already a problem and adding up to 200 more people will only compound them and make them significantly worse." Tr. 232-233.

6. Andrea Gabossy (Tr. 234-242):

Andrea Gabossy testified that she lives at 6213 Berkshire Drive in Bethesda. She lives directly across Berkshire Drive from the subject site. Ms. Gabossy is very concerned about parking, because should there be overflow, she will be directly impacted. Usually the parking lot is full to the north end of

Balducci's, and during the day there's a lot of traffic. During the day and on weekends, people park sometimes in front of her house or near Yorkshire, where you've heard there were pedestrian entrances right across from Chatsworth through the fence and Yorkshire. She also agrees with what the previous testimony that "traffic congestion at Cheshire and Grosvenor where the four way stop sign is, is absolutely abominable. . . . [I]t does back up eastbound onto Cheshire Drive at that four way intersection, seven, eight, nine cars deep. Tr. 234-236.

Ms. Gabossy asked that Mr. Aubinoe support some kind of a permit parking program that would limit parking on both sides of Berkshire Drive. [Mr. Kline agreed to support whatever the community wanted to do in this regard.] Tr. 237-40. In response to questions from Mr. Dias, Ms. Gabossy testified that Berkshire Drive is narrow and sloping, and that people tend to speed on it. Tr. 240-241.

7. Brenda Sandler (Tr. 242-248):

Brenda Sandler testified that she lives at 6216 Yorkshire Terrace in Bethesda. She indicated that some issues have been resolved but she is still concerned about parking, traffic congestion and the public school impact. Tr. 242-243. Ms. Sandler noted that there would not be enough parking for the new building to meet regulations without employing the shared parking concept. She feels that there still will not be enough unrestricted parking spaces available. Tr. 243-244.

Ms. Sandler further testified that there is a lack of parking spaces, and during the day the front and back of that shopping center are full. Therefore people are parking where the footprint of the apartment building will be. So there will be spillover. The impact on the community would be the parking on Berkshire Drive, which is narrow. She would also like to extend permit parking to Yorkshire, Chatsworth and Avon, just the first areas of the streets that are perpendicular to Berkshire, because people will be parking there. Tr. 245.

Ms. Sandler noted that according to the Montgomery County Planning Department's 2011 Mobility Assessment Report, the worst intersection in Montgomery County is the intersection of

Democracy Boulevard and Old Georgetown Road in Bethesda. This traffic study was done even before the opening of the new National Walter Reed Medical Hospital on the grounds of Bethesda Naval Hospital, which is Rockville Pike and has impacted backup on Old Georgetown Road. The residents of Wildwood Manor and other residential communities all around Ashburton, every day they have a tremendous traffic situation, and the egress and entrance to this new apartment building will only be through Old Georgetown Road. Everything ends up on Old Georgetown Road. Tr. 246.

Ms. Sandler is also concerned because the area schools are already at or above capacity. She asked whether there can be productivity units for senior citizens, which will have fewer cars and no impact on the schools. She also suggested that parking spaces for residents be leased. Tr. 247.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational

characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a dwelling in a commercial or industrial district. Characteristics of the proposed dwelling in a commercial or industrial district that are consistent with the “necessarily associated” characteristics of dwellings in commercial or industrial districts will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with dwellings in commercial or industrial districts, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff described the physical and operational characteristics necessarily associated with a dwelling in a commercial or industrial district as follows (Exhibit 20, p. 17):

The inherent adverse effects associated with this particular residential dwelling include[]:

- (1) buildings on-site;
- (2) parking facilities to accommodate residents, employees, patients<sup>18</sup> and visitors;
- (3) recreation facilities and pedestrian linkages;
- (4) lighting;
- (5) traffic to and from the site by staff, visitors and residents; and
- (6) noise associated with the delivery of supplies, loading, and garbage pick-up.

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<sup>18</sup> The Hearing Examiner presumes that Technical Staff included parking for “patients” because some of the parking will be shared with the other uses on site, which include a medical office building.

To this description, the Hearing Examiner would add that one would expect a dwelling in a commercial or industrial district to produce some noise generated by equipment for the facility (*e.g.*, HVACs) and by occasional outdoor activities of residents and their families. The Hearing Examiner believes that these factors are inherent in all dwellings in commercial or industrial districts, by their nature, although their impact will vary significantly according to the nature of the dwelling, its size and its location.

In the subject case, Technical Staff lists only one non-inherent adverse effect – “potential parking issues.” Exhibit 20, p. 17. The Hearing Examiner does not view parking characteristics on this site as “non-inherent” because the site is large enough to permit more than the parking called for in the shared-parking calculation, and in the opinion of Staff, the Planning Board and the Hearing Examiner, the shared-parking calculation is appropriate in this case. Parking facilities are an inherent characteristic of this type of use, as recognized by Technical Staff. The only thing that would make this characteristic non-inherent is if there were an unusual site condition which would create adverse effects in connection with the parking facility. It appears from the evidence that the shared parking in this mixed use setting is neither unusual nor likely to create adverse effects, given that there is room for 21 more parking spaces than the shared-parking calculation would require.

On the other hand, the Hearing Examiner finds that the unusual site condition of stormwater runoff, which is contributing to environmental problems within the defined neighborhood, is a non-inherent characteristic of the site. Nevertheless, as discussed at length in Part II. E. of this report, the proposed special exception will actually help alleviate the problem, not worsen it. Whether more than that is required for this site under applicable stormwater management regulations is a decision for DPS and the Planning Board at this stage, not the Board of Appeals.

Technical Staff analyzed the remaining characteristics of the site as follows (Exhibit 20, p. 18):

The other inherent characteristics of size, scale, and scope associated with the proposed application are minimal and not likely to result in any unacceptable noise, traffic

disruption, or environmental impacts at the proposed location. The proposed scale of the five-story building is designed in a manner that complements the surrounding residential characteristics: stepping up from detached units within a residential neighborhood to mid-rise multi-family units along Old Georgetown Road. Activity for residents will be provided through local services and proposed community room and exercise facilities. Existing tree buffers and enhanced landscaping is proposed in order to maintain the general character of the neighborhood. The less intense residential use would result in less traffic to and from the site than the previously approved office use. Also, the area is “served by transportation infrastructure” (p.33) by Metrobus (J-2 and J-3) and Montgomery County Ride On (#6 and #70) serving nearby roadways of Old Georgetown Road and Democracy Boulevard. There are adequate and safe pedestrian links proposed and existing for the residents. The location of the loading dock on the north side of the building minimizes noise impacts on nearby residences.

Based on the record discussed extensively in this report, the Hearing Examiner agrees with Technical Staff’s conclusion that the proposed use is compatible with adjacent development and finds no non-inherent characteristics of the proposed building warranting denial of the petition.

### **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the testimony and exhibits of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A dwelling in a commercial or industrial district is a permissible special exception in the O-M Zone, pursuant to Zoning Ordinance §§59-C-4.2(a) and 59-G-2.36.2.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.36.2 for a dwelling in a commercial or industrial district, as outlined in Part IV. C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site lies within the area analyzed by the 1992 North Bethesda/Garrett Park Master Plan, which was discussed in Part II. D. of this report. For the reasons set forth in that section, the Hearing Examiner finds that the proposed use is consistent with the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: In the opinion of land planner, Victoria Bryant, an apartment building would not change the character of the neighborhood, because the character of the neighborhood is a mixed-use neighborhood. Moreover, the apartment building, although it will be larger than the previously planned office building, will be a lower intensity use than the office building would have been. It will generate less traffic and activity since a residential building disseminates that activity over a broader period of time than would occur with an office building. Tr. 105-108.

Technical Staff addressed the issue of “harmony with the general character of the neighborhood” as follows (Exhibit 20, p. 20):



The proposed use will be in harmony with the general character of the surrounding residential neighborhood and commercial areas considering population density, design, scale, and bulk of the proposed new structure. The scale and height of the new residential building (50 feet maximum) will be constructed with a two-story underground garage that will help to preserve green space and landscaping will provide sufficient buffering from the existing residential neighborhood to the east. The traffic generated by the residential use can be adequately accommodated by the existing roadway network. Parking provided under the shared use provisions of the ordinance are supported by proximity to retail, services, bus lines, etc.

As previously noted, Staff also observed that “The proposed scale of the five-story building is designed in a manner that complements the surrounding residential characteristics.” Exhibit 20, p. 18. For these reasons and those set forth in Part II of this report, the Hearing Examiner finds that the proposed use will be in harmony with the general mixed-use character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: As discussed in Part II. of this report and in response to General Standard 4, above, the evidence supports the conclusion that this project will be compatible with its neighbors, and there is no evidence that it will reduce the economic value of surrounding properties. In fact, the evidence is that it will improve stormwater drainage in the area, and will not produce as much traffic during critical periods as the office building previously approved for the site. The Hearing Examiner agrees with Technical Staff’s conclusion that “[t]he use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood because appropriate buffering is provided.” Exhibit 20, p. 20.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff addressed these issues as follows (Exhibit 20, p. 20):

The use will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have elsewhere in the zone. The residential nature of the use will fit harmoniously within the context of the surrounding residential and commercial developments. All exterior lighting will be installed and maintained in a manner not to cause glare or reflection into abutting properties. Loading and service areas have been located on the north side of the proposed building to minimize impacts of noise and fumes. The proposed fence will also prevent headlight intrusion.

As discussed in Part II. C. 3.b. of this report, Petitioner's Photometric Lighting Plan (Exhibit 6(d)), indicates that, for the most part, lighting that borders residential areas will not exceed 0.1 footcandles. While there are minor exceedances in parts of the Photometric Lighting Plan, none of those exceedances are located between the proposed building and the adjacent residential zone. Moreover, the exceedances that do exist elsewhere on the site are located in areas around driveways, entrances or parking lots, where safety would dictate the need for adequate lighting in the commercial zone. Given the fact that the subject site is not in a residential zone and Staff's finding that the proposed lighting will not cause glare into adjoining residential properties (Exhibit 20, p. 13), the Hearing Examiner recommends that the Board of Appeals approve the lighting plan, even if it contains small lighting exceedances, to the extent the Planning Board finds that such exceedances are appropriate for this mixed use area, as authorized by Zoning Ordinance §59-G-1.23(h) "*to improve public safety.*"

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff states, in response to this section (Exhibit 20, pp. 20-21):

The proposed special exception is located on commercially zoned land that contains office and retail uses. The approval of this special exception request will not increase the number, intensity, or scope of special exception uses such as to have any adverse effect or to alter the residential nature of such areas. The language in the Master Plan is intended to protect the integrity of residential neighborhoods which is not applicable in this case.

The Hearing Examiner agrees. The only other nearby special exceptions mentioned by Technical Staff are BA-1631, which allowed construction of a medical office building on the property in 1964; CBA-1667, which allows the abutting shopping center to operate a parking lot in the R-90 zone; and S-1903, which was approved in 1992 to upgrade and rebuild the gasoline station abutting the subject property to the west.

Exhibit 20, p. 3. The proposed special exception is consistent with the recommendations of the applicable Master Plan and will not change the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide productivity housing that is needed in the area, and as noted by Staff, will increase the variety of housing options near employment centers.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

- (B) *If the special exception:*
- (i) *does not require approval of a new preliminary plan of subdivision; and*
  - (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*

*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would require approval of an amended preliminary plan of subdivision. Therefore, the adequacy of public facilities will be determined by the Planning Board in connection with the amended preliminary plan, and approval of the amended preliminary plan of subdivision is a recommended condition in Part V of this report, as required by this section of the Zoning Ordinance. Nevertheless, the evidence, which is discussed in Part II. C. 5. of this report, supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: As discussed in Part II. C. 4. of this report, there is ample evidence that site access and circulation will be safe and efficient for pedestrian and vehicular traffic. Technical Staff added that (Exhibit 20, p. 22):

... There is no evidence that the use will reduce the safety of vehicular or pedestrian traffic. Access points from Old Georgetown Road are deemed to be safe and efficient and on-site vehicular and pedestrian circulation systems shown on the application are adequate.

This finding is supported by the expert evidence, and the Hearing Examiner so finds.

### C. Specific Standards

The testimony and the exhibits of record (including the Technical Staff Report, Exhibit 20) provide sufficient evidence that the specific standards required by Section 59-G-2.36.2 are satisfied in this case, as described below.

#### **Sec. 59-G-2.36.2. Dwellings.**

*(a) Dwellings in a commercial or industrial district must be compatible with existing or planned development on the same lot or tract and be compatible with the surrounding area. Dwellings developed in a commercial or industrial district may be combined with proposed or existing office, retail or industrial development or may be developed in lieu of non-residential development, provided there remains adequate land zoned for such development to serve the immediate neighborhood.*

Conclusion: Petitioner's architect, Sassan Gharai, testified that, in his opinion, the building design will meet the purpose and standard and regulations of the O-M Zone, accomplishing something that is compatible with the surrounding neighborhood. It will be buffered from the neighborhood sufficiently and will clearly be part of the commercial zone in front of it. Tr. 61-62. He also noted that the planned residential building would be "a lot more compatible" with the neighborhood than the previously planned office building. Tr. 90-91. Petitioner's land planner, Victoria Bryant, testified that with the limitations imposed by the binding elements and the design criteria, both the use and the design are compatible with the setting where it's located. "[It] is a great transitional use between the single family and the commercial that exists there today." She noted that along the east side, the building will be only two feet higher than the 35 foot height allowed under the R-90 Zone for a single-family home. Thus, the massing on the back side has been minimized. Tr. 114-116. Ms. Bryant opined that the proposal will result in an internally compatible development with no adverse effect on the surrounding community. Tr. 130. She noted

that traditionally a multifamily building is a good transitional use between commercial and single-family residential. In her opinion, it is compatible. Tr. 132-135.

Wendy Calhoun, a neighbor testifying in opposition, stated that she does not understand how one after another of the experts can come in and testify that the proposed building will be compatible with the neighborhood, when those who live there completely disagree. She feels that the renderings are much better this time around than when she saw them initially, and the landscaping now looks very nice; however, she is opposed to it not because of how it looks, but because she believes it will add 200 people to this community. Tr. 229-233.

Technical Staff submitted the following opinion regarding compatibility (Exhibit 20, pp. 24-25):

Provided that the project is developed within the binding elements stipulated in the SDPA application and the conditions specified under the recommended approval of the special exception, both the structure and the use of the subject property are compatible with both the commercial and residential uses that surround the property. The use is a mixed-income residential building that will provide attractive, convenient, and affordable housing in close proximity to nearby employment and commercial centers. The use will complement and enliven the commercial uses in the surrounding area. The project proposes a residential density that conforms to the applicable standards of the zone.

The Hearing agrees with Technical Staff in this regard, and finds that the proposed building will be compatible with existing or planned development on the same lot and with the surrounding area.

*(b) Dwellings in a commercial or industrial district are subject to the following standards:*

*(1) Not more than twenty-five percent (25%) of the land which is either zoned or recommended for commercial or industrial zoning in the applicable approved and adopted master plan may be used for housing.*

Conclusion: Technical Staff addresses this provision directly (Exhibit 20, p. 25):

The use is the only residential project on commercial or industrial zoned land in the master plan area and represents less than 25% of that zoning. The footprint of the proposed residential building covers approximately 16,670 square feet of land area, or 10.94% of the total site area (152,334 square feet).

There is no contradictory evidence in the record on this point, and the Hearing Examiner therefore finds that no more than 25% of the commercially zoned area is being proposed for housing.

*(2) Dwellings in a commercial or industrial district must meet the development standards of the applicable zone concerning minimum setbacks, green area, and lot coverage. The base residential density is 6.0 units per acre, which may be increased up to 21.5 units per acre if at least 35 percent of the units are productivity housing for households with incomes at and below the area wide median income, as provided for in Chapter 25B, Article IV, of the County Code. The maximum height allowed in the applicable commercial zone may be adjusted not to exceed a total height of 50' to accommodate residential development above a commercial structure as authorized under Sec. 59-G-1.23. These standards apply to all buildings on a site, including those that contain housing. The required green area may be adjusted to assure compatibility of uses, or to accommodate housing if not otherwise feasible or appropriate.*

Conclusion: Technical Staff found (Exhibit 20, p. 25):

The proposed project satisfies all of the development standards listed above for the O-M zone. The proposed density is 16.6 units per acre. The special exception will provide 35% of its housing incomes for incomes at and below 75% of the area wide medium income level pursuant to Section 25B-17(j) of the County Code and Executive Regulation 19-98. The proposed building will be five stories tall at its highest point and will be no more than 50 feet in height as measured from the average grade along the building's Old Georgetown Road frontage. Green area provided over the entire site is approximately 40%. Lot coverage is approximately 22%.

Technical Staff also provided a table demonstrating Petitioner's compliance with all the development standards of the O-M Zone. Exhibit 20, pp. 22-23. It is reproduced on the next page:

**Development Standards for the O-M Zone**

<b><u>Development Standard</u></b>	<b><u>Permitted/ Required</u></b>	<b><u>Previously Approved</u></b>	<b><u>Proposed for Approval</u></b>
<b><u>Net Lot Area (acres)</u></b>	<u>n/a</u>	<u>3.5</u>	<u>3.5</u>
<b><u>Max. Building Coverage (%)</u></b>	<u>60</u>	<u>n/a</u>	<u>22</u>
<b><u>Max. Building Height (feet)</u></b>			
Proposed Residential Building	<u>60 (5 stories)</u>	<u>n/a</u>	<u>Not greater than 5 stories or 50 feet</u>
<b><u>Max. Floor Area Ratio (FAR)</u></b>	<u>1.5</u>	<u>0.46</u>	<u>1.27</u>
<b><u>Min. Building Setbacks (feet)</u></b>			
Old Georgetown Road Right-of-Way	<u>15</u>	<u>50</u>	<u>54</u>
Berkshire Drive Right-of-Way	<u>15</u>	<u>130</u>	<u>62</u>
Adj. to Property Line (R-90 zone to south)	<u>1 ft. per 3 ft. of height</u>	<u>16</u>	<u>19</u>
Adj. to Property Line (R-90 zone to north)	<u>1 ft. per 3 ft. of height</u>	<u>n/a</u>	<u>119</u>
<b><u>Min. Green Area (%)</u></b>	<u>10</u>	<u>n/a</u>	<u>40</u>
<b><u>Min. Parking Spaces (without shared parking calculation)<sup>19</sup></u></b>	<u>247</u>	<u>274</u>	<u>225</u>

There is no contradictory evidence in the record on this point, and the Hearing Examiner therefore finds that Petitioner is compliant with this provision.

(3) *Access must be provided by one or more direct driveways to a public street. The entrance must be located and appropriately lighted to assure safe access for residents, whether or not commercial or industrial uses on the same lot are in operation.*

**Conclusion:** As demonstrated by Exhibit 43, the site access and circulation exhibit, the required access will be provided. Technical Staff concurs, stating, “The proposed project will have direct egress and ingress to the property via Rock Spring Drive that intersects with Old Georgetown Road. Furthermore, the property will have supplemental access from the south linking to both the Wildwood Shopping Center and two signalized intersections

<sup>19</sup> As discussed in Part II.C.5.b. of this report, using the recommended shared parking calculation results in a requirement for only 204 parking spaces on this site, a development standard which Petitioner more than meets with 225 parking spaces.



from the shopping center to Old Georgetown Road.” Exhibit 20, pp. 25-26. Staff also notes that “The lighting plan adequately and efficiently covers the main vehicular access to the site, as well as the parking, and loading areas; in order to create a safe vehicular and pedestrian environment.” Exhibit 20, p. 24. Although Design Element 2 in SDPA 12-1 indicates that “The details of a lighting plan are to be determined at the time of site plan review . . .,” the Hearing Examiner finds that the current record sufficiently establishes that adequate access and lighting will be provided.

*(4) A minimum of one (1) on-site parking space per dwelling unit must be provided. Additional parking spaces must be provided up to the total required by the relevant standards of Section 59-E-3.7, except that the Board may approve shared parking in accordance with the provisions of Section 59-E-3.1 to accommodate these additional spaces.*

Conclusion: As discussed at length in Part II.C.5.b of this report, Technical Staff, the Planning Board and the Hearing Examiner all recommend that the Board of Appeals approve shared parking for this mixed-use site in accordance with the provisions of Zoning Ordinance §59-E-3.1. Applying that calculation methodology, 204 parking spaces would be required for the site. Petitioner will be supplying 225 parking spaces for the site, which is 21 more than would be required, and the Hearing Examiner therefore finds that it will be in compliance with this provision.

*(5) The property must be located in an area served by public water and sewer and must be in water and sewer categories 1, 2, or 3.*

Conclusion: As specified by Technical Staff, the subject property is served by public water and sewer and is in categories W-1 and S-1. Exhibit 20, p. 26. The Hearing Examiner therefore finds that Petitioner is in compliance with this provision.

*(c) Design plan.*

(1) *In addition to submitting such other information as may be required, a design plan of proposed development must also be submitted at the time the application is made. The design plan must show the size and shape of the subject property, the location of all buildings and structures, the area devoted to parking, any recreation facilities to be provided, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.*

Conclusion: Such a design plan of proposed development has been submitted in the form of a revised Special Exception Plan (Exhibit 56(a)) and a revised Landscaping Plan (Exhibit 26(b)). However, as noted by Technical Staff, “Final design aspects will be completed with the site plan amendment.” Exhibit 20, p. 27. Thus, Petitioner is in compliance with this provision.

(2) *No special exception, building permit or certificate of occupancy may be granted or issued except in accordance with a design plan of development approved by the Board of Appeals. The Board may condition its approval of a design plan on such amendments as determined necessary to assure an internally compatible development which will have no adverse effect on the surrounding community.*

Conclusion: Given the fact that the plans for this site must also be reviewed by the Council in connection with SDPA 12-1 and by the Planning Board in connection with preliminary plan amendment and site plan review, the Hearing Examiner recommends, *inter alia*, the following two conditions in Part V of this report:

12. This special exception is conditioned upon the approval by the County Council, sitting as District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland, of SDPA 12-1 in substantially the same form as shown in Exhibit 47(a) in the file of SDPA 12-1, but modified in accordance with Condition 13, below.

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\*

14. Since the proposed use will require an amendment to the existing preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception is conditioned upon approval of an amendment to the preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required by the subdivision amendment process, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.

## **D. Additional Applicable Standards**

### **Section 59-G-1.23. General development standards.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The Table from the Staff report (Exhibit 20, pp. 22-23), and reproduced on page 108 of this report, demonstrates compliance with all applicable development standards.

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed above and at length in Part II.C.5.b of this report, Technical Staff, the Planning Board and the Hearing Examiner all recommend that the Board of Appeals approve shared parking for this mixed-use site in accordance with the provisions of Zoning Ordinance §59-E-3.1. Applying that calculation methodology, 204 parking spaces would be required for the site. Petitioner will be supplying 225 parking spaces for the site, which is 21 more than would be required, and the Hearing Examiner therefore finds that it will be in compliance with this provision.

*(c) Minimum frontage \* \* \**

Conclusion: Not applicable, since none of the listed uses are involved and no waiver is being sought.

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: As discussed in Part II. E. of this report, the subject site is exempt from preparing a Forest Conservation Plan (FCP) because the project is a modification to an existing developed property and contains no forest or stream valley buffers. The Technical Staff report notes

that this project will require a Preliminary Plan Amendment, at which time the NRI/FSD approval and the FCP exemption will be re-evaluated. Exhibit 20, p. 13.

*(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Water Quality Plans are used in special protection areas (SPAs), as specified in Zoning Ordinance §59-A-2.1. Since the subject site is not in an SPA, this provision is inapplicable to this case.

*(f) Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner has not proposed any new signage on the special exception site plan at this time. As noted by Technical Staff (Exhibit 20, p. 24), any signage proposed by Petitioner must comply with Chapter 59-F of the Zoning Ordinance. Moreover, if signage is added to the site, an amended special exception site plan must be filed with the Board of Appeals, so indicating. In addition, Petitioner has agreed that, at the time of site plan review, it will have selected, and will use exclusively, a name or identifier for the project which will not include the word “Wildwood” in the title. Tr. 19. This concession to the neighbors was agreed to in order to preserve the term in association with a single-family neighborhood. A condition has been recommended in part V of this report to reflect this agreement.

*(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials,*

*and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: This section is technically not applicable to the proposed building because the subject site is not in a residential zone; however, as discussed elsewhere in this report, the architectural design of the planned structure, and its setting, setbacks and landscaping will make it compatible with this mixed-use neighborhood.

*(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: As discussed in Part II.C.3.b. of this report and on page 102 of this report, there are minor exceedances of the 0.1 foot-candle standard in parts of the site, per the Photometric Lighting Plan (Exhibit 6(d)); however, none of those exceedances are located between the proposed building and the adjacent residential zone, and the lighting plan will be examined by the Planning Board at site plan review. Given the fact that the subject site is not in a residential zone and Staff's finding that the proposed lighting will not cause glare into adjoining residential properties, the Hearing Examiner recommends that the Board of Appeals approve the lighting plan, even if it contains small lighting exceedances, to the extent the Planning Board finds that such exceedances are appropriate for this mixed use area, as authorized by Zoning Ordinance §59-G-1.23(h) "*to improve public safety.*" A condition to this effect is recommended in Part V of this report.

#### **Section 59-G-1.26. Exterior appearance in residential zones.**

*A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior*

*appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.*

Conclusion: Although this section does not technically apply since the proposed building will not be in a residential zone, the planned structure will have a residential appearance and will be appropriately landscaped and screened. It will also have suitable pedestrian circulation.

Based on the record in this case, the Hearing Examiner concludes that Petitioner has satisfied the general and specific requirements for the special exception it seeks. In sum, the special exception for a dwelling in a commercial or industrial district, as proposed by Petitioner, should be granted, subject to the conditions set forth in Part V of this report.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2830, seeking a special exception to permit establishment and use of a dwelling in a commercial district on Lot N-541, Wildwood Manor Shopping Center Subdivision, located at 10401 Old Georgetown Road, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and the representations of its counsel identified in this report.
2. The Petitioner must limit subsequent preliminary and site plan amendments to a maximum of 58 mid-rise apartments in addition to the 36,423 square feet of existing medical office space, limited to 30,000 square feet of leasable office space, and 3,470 square feet of bank uses.
3. The Petitioner must provide a minimum of 225 total parking spaces on-site; the Board of Appeals approves shared parking in accordance with the provisions of Zoning Ordinance §59-E-3.1.
4. The Petitioner must receive approval of an amended preliminary plan and site plan by the Planning Board.
5. At the time of preliminary plan amendment, the Petitioner must satisfy the Policy Area Mobility Review (PAMR) test by installing and/or funding off-site non-auto transportation improvements as

determined by the total number of units and unit types approved by the preliminary plan.

6. At the time of preliminary plan amendment, the Petitioner must provide sidewalks with at-grade crossing or handicapped ramps around the entire proposed apartment building and to the nearby buildings on the site.

7. At the time of the site plan amendment, the Petitioner must provide the number and location of parking spaces for the proposed residences and existing office visitors/employees as required in the County Code and Zoning Ordinance, while demonstrating security for the residential parking.

8. At the time of the site plan amendment, the Petitioner must provide bicycle parking for visitors and residents as determined by the total number of units and unit types approved by the site plan.

9. Prior to release of any building permits for each proposed phase, Petitioner must provide the non-auto transportation improvements by making a payment via an acceptable financial instrument either to the Maryland State Highway Administration (SHA) or Montgomery County Department of Transportation (MCDOT).

10. Shade trees must be provided along Old Georgetown Road in conformance with the Master Plan, as determined at Site Plan.

11. The Petitioner must not charge any parking fees for parking spaces within the apartment building that are not reserved for residents.

12. This special exception is conditioned upon the approval by the County Council, sitting as District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland, of SDPA 12-1 in substantially the same form as shown in Exhibit 47(a) in the file of SDPA 12-1, but modified in accordance with Condition 13, below.

13. At the very least, Petitioner must take whatever steps are necessary to ensure that this special exception will not result in more stormwater running off the site than currently occurs. In addition, to make it clear that DPS and the Planning Board may elect to impose more stringent stormwater management conditions, Petitioner must amend SDPA 12-1 Design Criterion 1 to read:

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed residential building and any other conditions imposed by DPS or the Planning Board. If any of the major assumptions on which the stormwater management plan approval is predicated change, due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval. [Underlining added to note change.]

14. Since the proposed use will require an amendment to the existing preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception is conditioned upon approval of an amendment to the preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required by the subdivision amendment process, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.

15. During the preliminary plan amendment process, Petitioner must demonstrate to the satisfaction of the Department of Permitting Services and the Planning Board that stormwater runoff from the entire site will comply with current State and County regulations and will not worsen the stormwater runoff conditions that currently exist downstream from the site.

16. The lighting for the site is permitted at the levels specified in photometric lighting plan (Exhibit 6(d)), to the extent the Planning Board finds that measurements exceeding 0.1 footcandles at the side and rear property lines are appropriate for this mixed use area *"to improve public safety,"* as authorized by Zoning Ordinance §59-G-1.23(h).

17. If signage is added to the site, an amended special exception site plan must be filed with the Board of Appeals, so indicating. A sign permit must be obtained for any proposed sign, and a copy of the permit for the approved signage must be submitted to the Board of Appeals before any sign is posted.

18. There must be no direct vehicular access between the subject site and Berkshire Drive.

19. The Petitioner shall install, maintain and replace, as necessary, trees in planters or appropriate tree planting containers, on the third and fourth floor roofs, intended to provide extensive screening and to reduce the visibility year round of the east facing fourth and fifth floor facades from the homes on Wildwood Manor located to the east of Berkshire Drive. The species of trees, size and time of planting, planter locations and spacing shall be as specified in Special Exception Landscaping Plan dated July 20, 2012 and designated Exhibit 26(b).

20. Garbage dumpster pick-ups must occur between the hours of 8:00 a.m. and 5:00 p.m. on weekdays, in accordance with the agreement of the parties. Tr. 66.

21. In accordance with the agreement of the parties (Tr. 66-67), the word "Wildwood" will not be used in the title of the proposed residential building, so as to preserve it as a name pertaining to the adjacent neighborhood of single-family, detached homes.

22. If the community seeks a parking permit program or a program to control non-resident parking on Berkshire Drive and/or other nearby streets, Petitioner must carry out its promise made at the hearing (Tr. 238-239; 279-280) to support those efforts.

23. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 5, 2012

Respectfully submitted,



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Martin L. Grossman, Hearing Examiner